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# **Swansea University Prifysgol Abertawe**

## **Old Policies, New Package? The Scope, Viability and Value Added of the “Responsibility to Protect”**

**Jennifer Dee Halbert**

LLB (hons)

Submitted to Swansea University in Fulfilment  
of the Requirements for the Degree of Doctor of Philosophy

**Volume I**

**2013**



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## ABSTRACT

In 2005 States accepted that there is a responsibility to protect (“RtoP”) populations when “man’s inhumanity to man” rises to the fore and that those entrusted to respond effectively should undertake appropriate protective action, not simply rely on “it” going away. The question which the thesis explores, largely from a legal and practice based perspective, is what the evolution of each component of RtoP discloses, over the past seven years, about its scope, status, viability and, more specifically, whether RtoP as it currently stands adds value to, or just newly packages, old protection policies.

The extensive practice reviewed, including over four hundred State views and fifteen country-specific studies, identifies which positions in the existing literature on RtoP may require revisiting, and what issues merit greater attention given their potential practical and policy significance. Where appropriate, the established field of minority protection is utilised to ground assessment of RtoP’s value added and identify possible policy implications of, or explanations for, the development of a responsibility which is still in its formative years. In so doing, present understandings of RtoP’s relationship to minority protection are examined and developed.

The view taken is that RtoP’s relationship with existing protection mechanisms is multifaceted and evolving, adding value in some ways but also creating points of departure. Whilst the broad based State support for RtoP developed since 2005 is cause for celebration, the Libya and Syria conflicts illuminated tensions inherent in RtoP, including whether it is possible to resist regime change and remain neutral in civil wars where governments perpetrate RtoP crimes. Until there is a greater cohesion among policymakers to address some of the controversial issues and other outstanding ambiguities, then it is quite likely that the focus on “RtoP” from 2005 will now shift perhaps to more “PtR” – “Protecting the Responsibility”.



# DECLARATION/STATEMENTS

## DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

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Date: 13th March 2013

## STATEMENT 1

This thesis is the result of my own investigations, except where otherwise stated. Where correction services have been used, the extent and nature of the correction is clearly marked in a footnote(s).

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## ACKNOWLEDGEMENTS

I would like to take this opportunity to extend my deepest thanks to those who ensured that I had the requisite support, assistance, care, and much more, throughout this project. First, thanks are owed to the School of Law at Swansea University and the Thomas and Elizabeth Williams Scholarship for providing the financial support necessary for this research.

I would like to thank all the staff in the School of Law at Swansea University, past and present, who encouraged me to begin this project and who gave me invaluable opportunities and continued assistance throughout the research period. I owe particular thanks to Professor Andrew Halpin and my second supervisor, Professor Volker Roeben, for entrusting me to carry out a range of teaching duties in the School as well as to assist them in their joint research project at a very early stage of my research.

I extend special thanks to my supervisor, Dr Helen Quane, and to Professor Carsten Stahn, whose undergraduate international law modules, provided a name to the issues which first captivated me as a child, growing up just outside the site of the Lockerbie air disaster, disturbed, yet intrigued, by the images of Bosnia and Rwanda flooding through on the television. I am sure that, without the opportunity to study these modules, my path would have quite likely been very different.

I am eternally indebted to the unwavering guidance, encouragement, support and general care that Dr Quane gave me at both an academic and personal level throughout the PhD. It has been both a pleasure and an honour to study under the supervision of such a remarkable academic and individual for the past years.

I am forever grateful to Professor Stahn for introducing me to the “Responsibility to Protect”, providing constructive assistance, encouraging me to strive academically and to commence this PhD. I feel most privileged to have had the opportunity to learn from such a gifted, inspiring academic and a truly kind, generous and supportive man.

Completing the PhD would have been a far more difficult task were it not for my elder sister, Joanna Elizabeth Halbert, showing constant interest in my work. I would like to thank her for the unqualified support she gave me and for always being there to listen. I look up to her now more than ever.

Deepest thanks are owed to my parents, David and Elizabeth Ann Halbert, who have shown me care, love, patience and support at every stage of my life. As a child, my parents taught me the meaning and value of Robert Burn’s references to “man’s inhumanity to man” and “a man’s a man for a’ [all] that”. As an adult, they encouraged me to explore those phrases more deeply, making sacrifices to ensure that I could and showing constant faith in my capacity to do so. Special mention must be given to my mother, friend and the most selfless person I know. I am eternally thankful for her kindness, devotion and unconditional support and belief in me – “thank you Mum”.

I dedicate this work to my family in view of all they have done and continue to do for me and for teaching me the values and sharing in the experiences which underscore it.

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## ABBREVIATIONS

**A. P. S. Rev.** American Political Science Review  
**Afr. J. Int'l & Comp. L** African Journal of International and Comparative Law  
**Am. S. Int'l L. Insights** American Society of International Law Insights  
**Am. Soc'y Int'l L. Proc.** American Society of International Law Proceedings  
**Am. U. Int'l Rev** American University International Law Review  
**AU** African Union  
**Cambridge Student L. Rev** Cambridge Student Law Review  
**Can. J. L. & Jurisprudence** Canadian Journal of Law and Jurisprudence  
**Case W. Res. J. Int'l L** Case Western Reserve Journal of International Law  
**Crim. L. F** Criminal Law Forum  
**CSCE** Commission on Security and Cooperation in Europe  
**Denv. J. Int'l L. & Pol'y** Denver Journal International Law and Policy  
**ECOWAS** Economic Community of West African States  
**EP** European Parliament  
**Fordham L. Rev** Fordham Law Review  
**Griffith L. Rev.** Griffith Law Review  
**GRtoP** Global Responsibility to Protect Journal  
**HCNM** High Commissioner for National Minorities  
**HLP** High-Level Panel on Threats, Challenges and Change  
**ICC** International Criminal Court  
**ICCPR** International Covenant on Civil and Political Rights  
**ICESCR** International Covenant on Economic, Social and Cultural Rights  
**ICISS** International Commission on Intervention and State Sovereignty  
**ICJ** International Court of Justice  
**ICLQ** International Comparative Law Quarterly  
**ICON** International Journal of Constitutional Law  
**I.J.R.L** International Journal of Refugee Law  
**ILC** International Law Commission  
**Int. J. Minority and Group Rts.** International Journal on Minority and Group Rights  
**Int'l J.** International Journal  
**Mich. J. Int'l L** Michigan Journal of International Law  
**N.Y.U.J. Int'l L. & Pol.** New York University Journal of International Law and Politics  
**NILQ** Northern Ireland Legal Quarterly  
**Nordic J. Int'l L** Nordic Journal of International Law  
**NTC** National Transitional Council of Libya  
**Nw. Univ. J. Int'l Hum Rts** Northwestern University Journal of International Human Rights Law  
**Or. Rev Int'l L.** Oregon Review of International Law  
**OSCE** Organisation for Security and Cooperation in Europe

**P5** Five Permanent Members of the United Nations Security Council (Russia, China, France, United Kingdom and the United States)

**PBC** Peacebuilding Commission

**R2P** Responsibility to Protect

**Res** Resolution

**Rome Statute** Rome Statute of the International Criminal Court 1998

**RtoP** Responsibility to Protect

**SAPG** United Nations Special Adviser on the Prevention of Genocide

**SNC** Syrian National Council

**Suffolk Transnat'l L. Rev** Suffolk Transnational Law Review

**Tex Int'l L. J** Texas International Law Journal

**U. Pa. J. Int'l L.** University of Pennsylvania Journal of International Law

**UNGA** United Nations General Assembly

**UNHCHR** United Nations High Commissioner for Human Rights

**UN OHCHR** United Nations Office of the High Commissioner for Human Rights

**UNHRC** United Nations Human Rights Council

**UNMIL** United Nations Mission in Libya

**UNOCI** United Nations Operation in the Côte d'Ivoire

**UNSC** United Nations Security Council

**UNSG** United Nations Secretary-General

**Wis. Int'l L. J** Wisconsin International Law Journal

# CHAPTER I

## THE RESPONSIBILITY TO PROTECT... CONSTRUCTION, CHANGE AND CONTEMPORARY CONSIDERATION

### Introduction

The 1990s brought to the fore the full depth of “man’s inhumanity to man” and the mixed responses of the international community thereto. The UN Security Council’s [UNSC] failure to act effectively in response to the 1994 Rwandan genocide highlighted that the world could not always rely on this body to take the steps necessary to protect a population from grave harm.<sup>1</sup> In 1999, the UNSC’s failure to agree on a robust response to the situation in Kosovo resulted in the use of unauthorised armed force to protect the Albanian population from Serb forces,<sup>2</sup> renewing debate over the permissibility and legality of so-called ‘humanitarian intervention’.<sup>3</sup> Is the use of armed force for human protection purposes legitimate? Can it be legally undertaken without the prior authorisation of the UNSC? What human rights violations warrant the use of armed force? How grave should those violations

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<sup>1</sup> J Alvarez, ‘Crimes of States/Crimes of Hate: Lessons from Rwanda’ (1999) 24 Yale J. Int’ L 365; J Sarkin and C Fowler, ‘The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to be Learned from the Role of the International Community and the Media During the Rwandan Genocide and the Conflict in the Former Yugoslavia’ (2010) 33 (1) Suffolk Transnat’l L. Rev 35 and R Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Arrow Books, London 2004).

<sup>2</sup> T G Weiss, *Humanitarian Crises and the Responsibility to Protect* (2nd edn Rowman and Littlefield Publishers, Oxford 2005) and K Booth, *The Kosovo Tragedy: The Human Rights Dimensions* (Frank Cass, London 2001).

<sup>3</sup> Humanitarian intervention is the subject of many definitions but, throughout this thesis, the concept will be used in accordance with the following definition of Harhoff: ‘[A]rmed force applied by one or more other states into the territory of the conflict state for a particular humanitarian purpose’. F Harhoff, ‘Unauthorised Humanitarian Interventions: Armed Violence in the Name of Humanity?’ (2001) 70 Nordic J. Int’l L. 65, 70-71. On the concept of humanitarian intervention see generally, T G Weiss, *Humanitarian Intervention* (Polity Press, Cambridge 2007); N Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP, Oxford 2003); J Welsh (ed), *Humanitarian Intervention and International Relations* (OUP, Oxford 2004); O Spiermann, ‘Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens’ (2002) 71 N.J. Int’l L. 523; J Rytter, ‘Humanitarian Intervention without the Security Council: From San Francisco to Kosovo - and Beyond’ (2001) 70 N.J. Int’l L. 121; J Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (OUP, Oxford 2010); N Chomsky, *A New Generation Draws the Line: “Humanitarian” Intervention and the Standards of the West* (Pluto Press, London 2012); C Badescu, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (Routledge, Abingdon 2011); A Hehir, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention* (Palgrave Macmillan, Basingstoke 2012) 57-82 and 149-177; G Evans, ‘From Humanitarian Intervention to the Responsibility to Protect’ (2006-2007) 24 Wis Int’l L. J. 703; A Bellamy, ‘Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit’ (2006) 20 (2) Eths & Int Affs. 143; J Pattison, ‘Humanitarian Intervention, the Responsibility to Protect and Jus in Bello’ (2009) 1 GRtoP 364; C Lu, ‘Humanitarian Intervention: Moral Ambition and Political Constraints’ (2007) 62 Int’l J. 942 and G Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, Washington D.C. 2008) 31-50.

be? States had reached no agreement on these questions by the end of the 1990s, leading the former UN Secretary-General [UNSG] to ask:

‘[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?’<sup>4</sup>

In response to this question, the then Canadian Prime Minister<sup>5</sup> announced the establishment of the International Commission on Intervention and State Sovereignty [ICISS]. ICISS were mandated to reconcile the ‘seemingly irreconcilable’<sup>6</sup> principles of State sovereignty and international intervention for human protection purposes, including the use of armed force.<sup>7</sup> Following a series of roundtables with stakeholders in human protection issues,<sup>8</sup> the ICISS published their final Report in 2001. The Report promoted the “Responsibility to Protect” [RtoP] as a framework which suitably balanced respect for State sovereignty and the permissibility of international action to protect a population inside a State from grave harm.<sup>9</sup> RtoP was subsequently endorsed in the 2004 Report of the High-Level Panel on Threats, Security and Change<sup>10</sup> [HLP] and the 2005 Report of the former UNSG. The latter encouraged States to ‘move towards embracing and acting on’<sup>11</sup> RtoP and recommended that the Report be discussed at the forthcoming session of the UN General Assembly<sup>12</sup> [UNGA]. This paved the way for RtoP’s official introduction to UN Member States.

Between April and September 2005 States participated in the drafting of the Outcome Document for consideration at the September 2005 World Summit.<sup>13</sup> Gaining State

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<sup>4</sup> Report of the UN Secretary-General Kofi Annan, ‘We the Peoples: The Role of the United Nations in the 21st Century’ (2000), 48 <<http://www.un.org/millennium/sg/report/full.htm>> accessed 12 August 2012.

<sup>5</sup> For a discussion of the composition, structure and processes of the Commission, see International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Research, Bibliography and Background* (International Development Research Centre, Ottawa 2001) 341-398. (ICISS, *Research, Bibliography and Background*).

<sup>6</sup> ICISS, *Research, Bibliography and Background*, ibid, 344.

<sup>7</sup> ICISS, *Research, Bibliography and Background*, ibid. The Commission’s mandate supplemented previous attempts to reconcile these competing principles. On this see M Bettati and B Kouchner, *Le Devoir d’Ingérence: Peut-On les Laisser Mourir?* (Denoël, Paris 1987); T Blair, “Doctrine of the International Community”, Speech delivered at Chicago Economic Club, 24 April 1999 [considered in Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (n 3), 33-34]; K Annan, ‘Two Concepts of Sovereignty’ *The Economist* (New York, 18 September 1999) <<http://www.economist.com/node/324795>> accessed 10 October 2012; F Deng and R Cohen, ‘Exodus within Borders: The Uprooted Who Never Left Home’ (1998) 77 (4) *Foreign Affairs* 12 and F Deng, *Sovereignty as Responsibility* (Brookings Institution, Washington D.C. 1995).

<sup>8</sup> On this see, International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, Ottawa 2001) 83 (ICISS Report). For the records of the roundtables, see ICISS, *Research, Bibliography and Background* (n 5), 349-399.

<sup>9</sup> ICISS Report, ibid, vii.

<sup>10</sup> Report of the High-Level Panel on Threats, Challenges and Change, ‘A More Secure World: Our Shared Responsibility’ (2004) UN Doc A/59/562, vii-x and 130 (HLP Report).

<sup>11</sup> Report of the Secretary General, ‘In Larger Freedom: Towards Development, Security and Human Rights for All’ (2005) UN Doc A/59/2005 (UNSG Report, ‘In Larger Freedom’). For a discussion of the contribution of this Report to RtoP’s conceptual construction see, C Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (2007) 101 (1) *AJIL* 99.

<sup>12</sup> Report of the UNSG, ‘In Larger Freedom’, ibid, 59.

<sup>13</sup> For a comprehensive discussion of the lead up to the World Summit see A Bellamy, *Responsibility to Protect: Global Effort to End Mass Atrocities* (Polity Press, Cambridge 2009) 65-97.

agreement on the specific language which should be used regarding RtoP was a protracted and fraught process, requiring several drafts to be formulated.<sup>14</sup> However, in terms of RtoP, the World Summit concluded encouragingly with States adopting the Outcome Document as UNGA Resolution 60/1 by consensus.<sup>15</sup> Significantly, this included a section devoted entirely to RtoP.<sup>16</sup>

The thesis examines the way in which RtoP has evolved, predominately from a legal perspective, in the seven years since the Outcome Document's adoption and, more specifically, what this practice tells us about RtoP's *scope*, *viability* and the *value* which it *adds* to existing protection mechanisms. This chapter outlines the conceptual framework of this assessment, the main themes in existing academic debate on RtoP and the research methodology.

Part one outlines the main themes in RtoP's development and refinement between the 2001 ICISS Report and 2005 World Summit. The chapter illustrates that fundamental changes were made to RtoP during this period, thereby clarifying why this thesis concentrates on practice between 2005 and 2012.

Part two explains that a substantial body of literature on RtoP arose in response to the abovementioned stages of development. The present author summates the main themes in present debate, outlining the range of significant questions which present debate on RtoP raises and sets aside.

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<sup>14</sup> The drafts of 3 June, 22 July and 5 August 2005 are reprinted in See the World Federalist Movement, 'State-by-State Positions on the Responsibility to Protect' (11 August 2005) <<http://www.responsibilitytoprotect.org/index.php/document-archive/civilsociety?view=fjrelated&id=2411>> accessed 11 August 2012. 'President's Draft Negotiating Document for the High-Level Plenary Meeting of the General Assembly of September 2005, submitted by the President of the General Assembly' (6 September 2005) paras 127-130; 'Draft Negotiated Outcome Document' (12 September 2005, 8 am) paras 127-130 and 'Draft Negotiated Outcome Document' (12 September 2005, 12:30 pm) [omitting any provisions on RtoP] <<http://www.responsibilitytoprotect.org/index.php/document-archive/united-nations?view=fjrelated&id=2410>> accessed 11 August 2012.

<sup>15</sup> UN General Assembly Resolution 60/1 (24 October 2005) UN Doc A/RES/60/1. (Outcome Document).

<sup>16</sup> The consensus adoption of RtoP by States represented a major milestone in RtoP's development and, therefore, the Outcome Document's three paragraphs on RtoP merit replication in full: '138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability. 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out. 140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide'. Outcome Document, *ibid*, paras 138-140.

Part three explains the methodology of the thesis. It outlines that RtoP's analysis is predominately practice based, utilising over four hundred State views on RtoP, case studies and the national, regional and international documents which inform, or otherwise influence, RtoP's 2005-2012 development. This section explains that the thesis uses the field of minority protection to strengthen its analysis of RtoP's significance, value added and implications at a policy, legal and practical level. Part three concludes with an overview of the range of issues which are examined in the thesis chapters, including key themes in present literature.

## 1 RtoP's Refinement (2001-2005)

Three main questions underscored RtoP's refinement between the 2001 ICISS Report and 2005 Outcome Document. Who owes RtoP and on what basis? What harm does RtoP seek to protect populations from? What does RtoP entail? The varying ways in which these questions were addressed between 2001 and 2005 merit reflection.

### 1.1.1 Who Owes RtoP and On What Basis?

To the ICISS, the development of human rights law had clarified that State sovereignty entailed responsibilities, requiring the State to protect persons within its territorial borders in order to enjoy respect for its sovereignty by external actors.<sup>17</sup> Drawing upon this concept of State 'sovereignty as responsibility',<sup>18</sup> ICISS outlined that all States owed a 'default'<sup>19</sup>

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<sup>17</sup> ICISS Report (n 8), 14. Academics have suggested that sovereignty was conditional upon protection of inhabitants prior to the post-war human rights movement. For example, the construct of 'natural rights' devised by natural law thinkers. See for e.g. S Krasner, *Sovereignty: Organised Hypocrisy* (Princeton University Press, New Jersey 1999) 8; Stahn 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 11), 111 and R Thakur and V Popovski, 'The Responsibility to Protect and Prosecute: The Parallel Erosion of Sovereignty and Impunity' (2007) 1 *The Global Community Yearbook of International Law and Jurisprudence* 39, 49. See further, A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, Cambridge 1995); G Kreijen, *State Sovereignty and International Governance* (OUP, Oxford 2002); M Martinez, *National Sovereignty and International Organisations* (Kluwer Law International, The Hague 1996); H Spruyt, *The Sovereign State and its Competitors* (Princeton University Press, Princeton 1994); K Bennouna, 'Sovereignty vs. Suffering: Re-Examining Sovereignty and Human Rights through the Lens of Iraq' (2002) 13 (1) *EJIL* 243 and C Weber, *Simulating Sovereignty: Intervention, the State and Symbolic Change* (CUP, Cambridge 1995).

<sup>18</sup> For an overview of the meaning of this principle, see generally ICISS Report, *ibid*, 28. On the origins of the principle, see especially, R Cohen, 'From Sovereign Responsibility to RtoP' in W Knight and Egerton F (eds), *The Routledge Handbook of the Responsibility to Protect* (Routledge, Abingdon 2012) 7-21; L Axworthy, 'RtoP and the Evolution of State Sovereignty' in J Genser and I Cotler (eds) *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time* (OUP, Oxford 2012) 3-16; Bellamy, *Responsibility to Protect: Global Effort to End Mass Atrocities* (n 13), 8-34 and E C Luck, 'Sovereignty, Choice and the Responsibility to Protect' in A Bellamy, S E Davies and L Glanville (eds), *The Responsibility to Protect and International Law* (Nijhoff, Leiden 2011) 13-24.

<sup>19</sup> ICISS Report, *ibid*, 17.



responsibility to protect their inhabitants [“primary RtoP”<sup>20</sup>]. Recognising that States are sometimes ‘unable or unwilling’<sup>21</sup> to provide this protection, the ICISS advised that primary RtoP was supplemented by the international community’s ‘residual’<sup>22</sup> responsibility to protect States’ populations [“secondary RtoP”]. The key difference between these two responsibilities lies in the point at which their discharge comes into effect. Given that sovereignty is a defining attribute of statehood,<sup>23</sup> all States’ owe their populations primary RtoP without exception. In contrast, ICISS noted that secondary RtoP is a ‘fallback responsibility’<sup>24</sup>, coming into practical effect when States cannot or will not fulfil primary RtoP.<sup>25</sup>

The Reports of the High-Level Panel and former UNSG affirmed ‘sovereignty as responsibility’<sup>26</sup> as the basis of primary RtoP and secondary RtoP as a responsibility in its own right.<sup>27</sup> The Outcome Document also recognised primary and secondary RtoP, but better distinguished their nature. Whilst ‘[e]ach individual State’<sup>28</sup> committed to protecting ‘its populations’<sup>29</sup> on a *general basis*, the international community agreed that it *should* take a range of steps as part of its responsibility to protect populations *when certain circumstances arose*.<sup>30</sup> Subsequent practice has upheld the Outcome Document’s clear delineation of RtoP as that which requires ‘[e]ach individual State to protect its populations’<sup>31</sup> from RtoP crimes and the international community to undertake protective actions toward this end.<sup>32</sup> The scope of the harm which State and the international community have a responsibility to protect populations from merits fuller reflection.

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<sup>20</sup> The RtoP that States owe to their own population has been summated in different ways. Whilst ICISS termed it ‘default’ RtoP, Hehir refers to it as ‘internal’ RtoP. The present author considers that Evans summation of the responsibility as “primary RtoP” and, the international community’s responsibility as “secondary RtoP” most appropriately denotes the character and scope of the responsibilities. For this reason, the thesis will invoke the terms “primary RtoP” and “secondary RtoP” from this point onward. See respectively, ICISS Report, *ibid*, 17; Hehir, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention* (n 3) 69 and Evans, ‘From Humanitarian Intervention to the Responsibility to Protect’, *ibid*, 709.

<sup>21</sup> ICISS Report (n 8), 7.

<sup>22</sup> ICISS Report, *ibid*, 17.

<sup>23</sup> ICISS, *Research, Bibliography and Background* (n 5), 6.

<sup>24</sup> ICISS Report (n 8), 11.

<sup>25</sup> ICISS Report, *ibid*, 17.

<sup>26</sup> HLP Report (n 10), 17-18. The then UNSG seemed to recognise the concept, albeit implicitly, in his statement that ‘no legal principle - not even sovereignty - should ever be allowed to shield genocide, crimes against humanity and mass human suffering’. Report of the UNSG, ‘In Larger Freedom’ (n 11), 34.

<sup>27</sup> HLP Report, *ibid*, 65-66. See also, Report of the UNSG, ‘In Larger Freedom’, *ibid*, 35.

<sup>28</sup> Outcome Document (n 15), para 138.

<sup>29</sup> Outcome Document, *ibid*.

<sup>30</sup> Outcome Document, *ibid*, paras 138-139.

<sup>31</sup> Outcome Document, *ibid*, para 138.

<sup>32</sup> For e.g. in the Report of the UN Secretary-General, ‘Implementing the Responsibility to Protect’ (12 January 2009) UN Doc A/63/677, 10-15 (Report of the UNSG, Implementing RtoP). The affirmation of primary RtoP in subsequent practice is outlined in chapter three.

### 1.1.2 A RtoP Populations, but from what Harm?

Throughout RtoP's development, different actors adopted competing approaches to the scope and nature of the harm to which primary and secondary RtoP relate. ICISS dealt with this issue as part of the discussion of when RtoP's discharge through armed force is warranted.<sup>33</sup> To ICISS, armed force could be used when a population sustains 'conscience-shocking'<sup>34</sup> harm, such as:

'[L]arge scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed State situation; or large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape'.<sup>35</sup>

ICISS elaborated on the kind of contexts which may entail these forms of harm. For example, ICISS suggested that RtoP should be discharged in relation to acts which are (i) regarded as genocide in the Convention on the Prevention and Punishment of the Crime of Genocide 1948, specifically those which 'involve large scale threatened or actual loss of life';<sup>36</sup> (ii) crimes against humanity and war crimes in treaties like the Geneva Conventions, including the Additional Protocols, provided that the acts in question 'involve large-scale killing or ethnic cleansing';<sup>37</sup> and (iii) in 'situations of State collapse and the resultant exposure of the population to mass starvation and/or civil war; and overwhelming natural or environmental catastrophes, where the State concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened'.<sup>38</sup> Thus to ICISS, RtoP could be discharged through the use of armed force in relation to harm which (i) is intentionally perpetrated (e.g. 'with genocidal intent');<sup>39</sup> or (ii) arises unintentionally (e.g. by State actors' omitting to act because they lack the capacity to do so effectively, such as 'a failed State situation').<sup>40</sup> The HLP Report provided that RtoP applied to situations of 'avoidable catastrophe'.<sup>41</sup> This excludes RtoP from applying to all natural disasters. However, the inclusion of 'avoidable'<sup>42</sup> suggests that the HLP considered that RtoP should cover natural disasters in which the population is sustaining harm, such as 'mass starvation

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<sup>33</sup> ICISS Report (n 8), 32-34. On this element of the ICISS Report, see N Oman, 'The 'Responsibility to Prevent': A Remit for Intervention?' (2009) 22 Can. J. L. & Jurisprudence 355, 365.

<sup>34</sup> ICISS Report, *ibid*, 33.

<sup>35</sup> ICISS Report, *ibid*, 32.

<sup>36</sup> ICISS Report, *ibid*, 33.

<sup>37</sup> ICISS Report, *ibid*.

<sup>38</sup> ICISS Report, *ibid*.

<sup>39</sup> ICISS Report, *ibid*, 32.

<sup>40</sup> ICISS Report, *ibid*.

<sup>41</sup> HLP Report (n 10), 65, *emphasis added*.

<sup>42</sup> HLP Report, *ibid*, *emphasis added*.

and exposure to disease',<sup>43</sup> because of the actions or inaction of the State's national authorities. For example, if national authorities (i) refuse the humanitarian assistance which is offered by external actors; or (ii) distribute assistance in a discriminatory manner, such as by not providing assistance to certain ethnic groups in the State. The former UNSG's Report did not discuss the scope of the harmful acts which RtoP should cover in similar detail but, rather, simply provided that RtoP applies to 'the potential and actual victims of massive atrocities'.<sup>44</sup> The Outcome Document helped to clarify the meaning of 'massive atrocities',<sup>45</sup> specifying that RtoP covers the harmful acts which can amount to 'genocide, war crimes, ethnic cleansing and crimes against humanity'.<sup>46</sup>

Examination of State views during the Outcome Document's drafting suggest that limiting the harmful acts which fall within RtoP's scope to the abovementioned was not a controversial decision.<sup>47</sup> This view is further supported by the fact that subsequent practice has affirmed that RtoP is limited to genocide, war crimes, crimes against humanity and ethnic cleansing 'until such times as States agree otherwise'.<sup>48</sup> Thus, whilst the Outcome Document does not explicitly affirm the State 'sovereignty as responsibility'<sup>49</sup> concept, its acceptance by States suggests that they recognise that the international community's interference in their internal affairs to protect populations from these harmful acts does not violate State sovereignty.<sup>50</sup> This recognition is quite likely underscored by wider developments in the years preceding the World Summit. By 2005, several instruments had contoured and prohibited genocide, crimes against humanity and war crimes<sup>51</sup> and, therefore, most States had already undertaken some of obligations to protect populations from these particular harmful acts.<sup>52</sup> There was also an understanding that gross human rights violations,

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<sup>43</sup> HLP Report, *ibid*.

<sup>44</sup> UNSG Report, 'In Larger Freedom' (n 11), 35.

<sup>45</sup> UNSG Report, *ibid*.

<sup>46</sup> Outcome Document (n 15), paras 138 and 139.

<sup>47</sup> The United States views during the drafting process are an exception. The significance and potential implications of this view are discussed in the substantive chapters, particularly chapter two and four.

<sup>48</sup> Report of the UNSG, Implementing RtoP (n 32), 8; International Law Commission, 'Provisional Summary Record of the 3015<sup>th</sup> Meeting of the 6th July 2009' (15 July 2009) UN Doc A/CN.4/SR.3015, 11 and International Law Commission, 'Second Report on the Protection of Persons in the Event of Disasters' (7 May 2009) UN Doc A/CN.4/615, 5. For the International Law Commission's discussions on RtoP see UNGA, 'Report of the International Law Commission, Fifty-Eighth Session' (2006) UN Doc A/61/10, 468; UNGA, 'Report of the International Law Commission: Sixtieth Session' (2008) UN Doc A/63/10, 322-323 and International Law Commission, Provisional Summary Record of the 3019<sup>th</sup> Meeting of the 10 July 2009' (22 July 2009) UN Doc A/CN.4/SR.3019, 3-9.

<sup>49</sup> ICISS Report (n 8), 28.

<sup>50</sup> S Rosenberg and E Strauss, "A Common Approach to the Application of the Responsibility to Protect" in D Fiott et al, *Operationalising the Responsibility to Protect: A Contribution to the Third Pillar Approach* (The Madariaga College of Europe Foundation, Brussels 2012) 59.

<sup>51</sup> For e.g. Convention on the Prevention and Punishment of the Crime of Genocide 1948 (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 and Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 arts 6-8. (Rome Statute).

<sup>52</sup> Rosenberg notes that the drafting of the Outcome Document suggests that the decision to formulate RtoP around the four crimes was made 'in order to limit the application of the RtoP to exceptional grave situations, where international law had already defined limitations to the principle of sovereignty'. Rosenberg and Strauss (n 50), 59.

such as genocide (i) are internationally wrongful acts in which the international community as a whole has a legitimate interest and for which the State can incur responsibility;<sup>53</sup> and (iii) can, since the International Criminal Court's [ICC] establishment in 2002, be investigated by its Office of the Prosecutor,<sup>54</sup> either at the Prosecutor's instigation,<sup>55</sup> request of a State party<sup>56</sup> or a UNSC referral.<sup>57</sup> In order to appreciate the range of contexts to which RtoP applies, it is useful to outline the kind of acts which can constitute genocide, war crimes, crimes against humanity and ethnic cleansing.

As it has long since been recognised that genocide and crimes against humanity can be committed outside conflict contexts,<sup>58</sup> a requirement for conflict would arise when RtoP is invoked on the pretext of responding to war crimes.<sup>59</sup> War crimes can arise from the perpetration of numerous acts in international or internal armed conflicts. In both conflict contexts, war crimes can include acts such as (i) grave breaches of the Geneva Conventions<sup>60</sup> (e.g. wilfully killing<sup>61</sup> and occasioning serious injury,<sup>62</sup> destroying and appropriating property,<sup>63</sup> and torture and inhuman treatment<sup>64</sup>); and (ii) the conscription or enlistment of children under fifteen years old for the active participation in hostilities.<sup>65</sup> Other acts are specific to the nature of the armed conflict. For example, using poisonous weapons,<sup>66</sup> intentionally launching attacks against civilians for non-military objectives<sup>67</sup> and the forcible

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<sup>53</sup> For example genocide and racial discrimination more broadly. See particularly, *Barcelona Traction Light and Power Company Case*, *International Court of Justice, ICJ Reports* 4, para 32. For a discussion of this recognition by the Court see S Ratner and J Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (OUP, Oxford 1997) 40. For a discussion of the way in which the development of the law on State responsibility for an internationally wrongful act underscores the RtoP framework, see especially: A Orford, *International Authority and the Responsibility to Protect* (CUP, Cambridge 2011) 25-27; E Strauss, "A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect" in Bellamy, Davies and Glanville (n 18), 48; M Payandeh, 'With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking' (2010) 35 *Yale Journal of Int'l L.* 469, 482-484 and 508-513; J Welsh and M Banda, "International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities" in Bellamy, Davies and Glanville (n 18), 216-220; L Glanville, 'The Responsibility to Protect Beyond Borders' (2012) 12 (1) *Hum Rts. L. Rev.* 1, 18-19 and 27-30; A Peters, 'Humanity as the Alpha and Omega of Sovereignty' (2009) 20 (3) *EJIL* 544, 540 and J Bruneau and S Toope, "The Responsibility to Protect and the Use of Force: Building Legality?" in Bellamy, Davies and Glanville (n 18), 74-77.

<sup>54</sup> On the powers and duties of the Office of the Prosecutor see Rome Statute (n 51) arts 53 and 54.

<sup>55</sup> Rome Statute, *ibid*, arts 13 (c) and 15.

<sup>56</sup> Rome Statute, *ibid*, arts 13 (a) and 14.

<sup>57</sup> Rome Statute, *ibid*, arts 13 (b) and 16.

<sup>58</sup> On this development, see for e.g. W A Schabas, *Report: Preventing Genocide and Mass Killing: The Challenge for the United Nations* (Minority Rights Group International, London 2006) 8-9 and R Cryer et al, *An Introduction to International Criminal Law and Procedure* (CUP, Cambridge 2007) 167.

<sup>59</sup> For a good overview of the legal elements of war crimes and their criminalisation in national and international practice, see T McCormack and G J Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, The Hague 1997).

<sup>60</sup> Rome Statute (n 51), art 8 (2) (a) (i)-(viii).

<sup>61</sup> Rome Statute, *ibid*, article 8 (2) (a) (i).

<sup>62</sup> Rome Statute, *ibid*, art 8 (2) (a) (iii).

<sup>63</sup> Rome Statute, *ibid*, art 8 (2) (a) (iv).

<sup>64</sup> Rome Statute, *ibid*, art 8 (2) (a) (ii).

<sup>65</sup> Rome Statute, *ibid*, art 8 (2) (b) (xxvi) [international armed conflict] and 8 (2) (e) (vii) [internal armed conflict].

<sup>66</sup> Rome Statute, *ibid*, art 8 (2) (b) (xvii).

<sup>67</sup> Rome Statute, *ibid*, art 8 (2) (b) (ii).

transfer of a population by an Occupying Power,<sup>68</sup> are acts which can amount to war crimes in the specific context of an *international* armed conflict. As the RtoP framework codified in the Outcome Document focuses on national authorities protecting their own populations and the international community's role when this protection is not ensured effectively,<sup>69</sup> RtoP will typically be invoked in relation to war crimes which are being, or are likely to be, perpetrated in an *internal* armed conflict.

There is some overlap in the acts which may amount to genocide and crimes against humanity. For example, both crimes can arise from the killing<sup>70</sup> or forcible transfer<sup>71</sup> of certain persons. The fundamental difference between genocide and crimes against humanity lies in the identity of the persons protected from the crimes and the nature of the further requirements for the commission thereof. For acts like the aforementioned to amount to genocide, they must be perpetrated 'with the *intent to destroy, in whole or in part, a national, ethnical, racial or religious group*, as such'.<sup>72</sup> In order for such acts to amount to a crime against humanity, they must be 'committed as part of a *widespread or systematic attack* directed against *any civilian population*, with *knowledge of the attack*'.<sup>73</sup> Significantly, the "attack" dimension requires that there be 'a course of conduct involving the multiple commission'<sup>74</sup> of the acts 'pursuant to or in furtherance of a State or organisational policy to commit such attack'.<sup>75</sup> Earlier practice considered the specific intent requirement of genocide as its *dolus specialis*<sup>76</sup> and that which rendered it as the "crime of crimes". A more recent and persuasive view is that this distinction does not render genocide any more heinous than crimes against humanity.<sup>77</sup> A further distinction between genocide and crimes against humanity is that the latter may be perpetrated through 'other inhumane acts'<sup>78</sup> which are not explicitly referred to in relevant instruments. This provision enabled the International Criminal Tribunal's for the Former Yugoslavia and Rwanda to address acts which their respective Statute's did not explicitly refer to.<sup>79</sup> In the context of the Rome Statute the provision ensures flexibility, enabling the ICC to prosecute new heinous acts that emerge in

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<sup>68</sup> Rome Statute, *ibid*, art 8 (2) (b) (viii).

<sup>69</sup> Outcome Document (n 15), para 139.

<sup>70</sup> Rome Statute (n 51), arts 6 (a) and 7 (1) (a).

<sup>71</sup> Rome Statute, *ibid*, arts 6 (e) and 7 (1) (d).

<sup>72</sup> Rome Statute, *ibid*, art 6, *emphasis added*.

<sup>73</sup> Rome Statute, *ibid*, art 7 (1), *emphasis added*.

<sup>74</sup> Rome Statute, *ibid*, art 7 (2) (a).

<sup>75</sup> Rome Statute, *ibid*.

<sup>76</sup> A Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' (2007) 5 (4) *J Int Crim Justice* 875, 881.

<sup>77</sup> See for e.g. Schabas' discussion of this distinction, drawing upon the Report of the Commission of Inquiry on Darfur. Schabas (n 58), 9.

<sup>78</sup> Rome Statute (n 51), art 7 (1) (k).

<sup>79</sup> Cryer (n 58), 219.

subsequent practice, fall within its jurisdiction and meet the additional requirements for a crime against humanity.<sup>80</sup>

The final issue of relevance here is the significance of the Outcome Document's explicit reference to "ethnic cleansing".<sup>81</sup> The term "ethnic cleansing" was used in its own right to describe the harm perpetrated in the Former Republic of Yugoslavia during the 1990s.<sup>82</sup> However, it is not codified as a distinct crime in present international law but, rather, is generally understood to be embodied within the scope of crimes against humanity<sup>83</sup> (e.g. forcible transfer of a population, persecution). The Outcome Document does not clarify whether its reference to "ethnic cleansing" is intended in the sense of its reflection in present international law. However, we may draw upon the ICISS Report which also explicitly referred to "ethnic cleansing".<sup>84</sup> On the one hand, ICISS appeared to invoke "ethnic cleansing"<sup>85</sup> as shorthand for some of the acts delineated in the Rome Statute as part of the *actus reus* of crimes against humanity. For example, the 'physical removal'<sup>86</sup> of parts of a specific group from a certain area reflects the understanding of ethnic cleansing as that which relates to the forcible transfer of parts of a population as a possible crime against humanity.<sup>87</sup> Conversely, it is arguable that if the references to "ethnic cleansing" in the ICISS Report and Outcome Document were intended to be interpreted as relating to crimes against humanity, then why not refer to crimes against humanity only? Whether the ICISS Report and Outcome Document intended to denote a distinction between the two or, indeed, whether broader considerations may have underscored their segregation, are questions for consideration in the substantive chapters. At this point, it is enough to note that this distinction was made and, in the interests of simplicity and conciseness, the harmful acts that RtoP covers will be hereafter abbreviated to "RtoP crimes" without prejudice to the fact that "ethnic cleansing" may not be regarded as a distinct "crime".

### 1.1.3 RtoP: What Does it Entail?

A central issue surrounding RtoP's development during this period was what primary and secondary RtoP *actually entail*. The ICISS, HLP and former UNSG gave particular attention

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<sup>80</sup> Cryer, *ibid*.

<sup>81</sup> Outcome Document (n 15), paras 138-139.

<sup>82</sup> Human Rights Commission Resolution S-2/1, 'The Situation of Human Rights in the Territory of the Former Yugoslavia' (1992) UN Doc 1992/S-2/1.

<sup>83</sup> See especially, D Scheffer, 'Atrocity Crimes Framing the Responsibility to Protect' (2007-2009) 40 Case W. Res. J. Int'l L. 111, 128.

<sup>84</sup> ICISS Report (n 8), 33.

<sup>85</sup> ICISS Report, *ibid*.

<sup>86</sup> ICISS Report, *ibid*.

<sup>87</sup> Rome Statute (n 51), art 7 (1) (d).

to outlining the scope of secondary RtoP. At the World Summit, the scope of primary RtoP was also developed.

The ICISS structured RtoP as a continuum of responsibilities to “prevent”,<sup>88</sup> “react”,<sup>89</sup> and “rebuild”.<sup>90</sup> ICISS adopted a wide view of prevention, recommending (i) the UN create an early warning system for human rights violations;<sup>91</sup> (ii) the application of ‘root cause’<sup>92</sup> political,<sup>93</sup> economic,<sup>94</sup> legal<sup>95</sup> and military measures<sup>96</sup> to address the root cause of human rights violations; and (iii) ‘direct’<sup>97</sup> preventive action be taken through the use of appropriate political,<sup>98</sup> economic,<sup>99</sup> legal<sup>100</sup> and military<sup>101</sup> measures. Essentially, direct and root cause prevention measures are distinguishable on the basis of *when* they should be deployed. Whilst root cause measures may be applied before any signs of human rights violations have emerged,<sup>102</sup> direct measures should be discharged when indicators of a possible degeneration to human rights violations and/or conflict emerge.<sup>103</sup>

ICISS’s inclusion of a “responsibility to react”<sup>104</sup> illustrates that it recognised that prevention will not always be successful. ICISS provided that the international community may react to harm sustained by a population in a variety of ways, including (i) targeted sanctions<sup>105</sup> (e.g. arms embargoes and asset freezing);<sup>106</sup> (ii) political mechanisms (e.g. suspending a State’s membership in regional and/or international organisations),<sup>107</sup> and (iii) if certain criteria were met, the use of armed force.<sup>108</sup> ICISS’s emphasis on the fact that the RtoP framework did not offer stakeholders a choice simply between ‘doing nothing or sending in the marines’<sup>109</sup> suggests that it was mindful of illustrating RtoP as something

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<sup>88</sup> ICISS Report (n 8), 19-27.

<sup>89</sup> ICISS Report, *ibid*, 29-37.

<sup>90</sup> ICISS Report, *ibid*, 39-45.

<sup>91</sup> ICISS Report, *ibid*, 21.

<sup>92</sup> ICISS Report, *ibid*, 22.

<sup>93</sup> For e.g. establishing national democratic institutions in order to combat factors like political repression. ICISS Report, *ibid*, 23.

<sup>94</sup> For e.g. providing development assistance provision in order to help reduce the link between poverty and the perpetration of human rights violations. ICISS Report, *ibid*.

<sup>95</sup> For e.g. strengthening national legal provisions for minority protection in order to guard against violations of minority rights. ICISS Report, *ibid*.

<sup>96</sup> For e.g. improving the training of military and security forces in order to deter their perpetration of human rights violations. ICISS Report, *ibid*.

<sup>97</sup> ICISS Report, *ibid*, 23-27.

<sup>98</sup> For e.g. deploying human rights fact-finding missions in order to establish the nature of the situation on the ground. ICISS Report, *ibid*, 24.

<sup>99</sup> For e.g. withdrawing development assistance in response to indicators of human rights violations/conflict. ICISS Report, *ibid*.

<sup>100</sup> For e.g. through redress to the International Criminal Court or States’ exercise of universal jurisdiction. ICISS Report, *ibid*, 24-25.

<sup>101</sup> For e.g. the ‘consensual preventive deployment’ of armed forces. ICISS Report, *ibid*, 25.

<sup>102</sup> ICISS Report, *ibid*, 22.

<sup>103</sup> ICISS Report, *ibid*, 23.

<sup>104</sup> ICISS Report, *ibid*, 29-37.

<sup>105</sup> ICISS Report, *ibid*, 29-30.

<sup>106</sup> ICISS Report, *ibid*, 30.

<sup>107</sup> ICISS Report, *ibid*, 31.

<sup>108</sup> ICISS Report, *ibid*, 31-37.

<sup>109</sup> Bellamy, *Responsibility to Protect: Global Effort to End Mass Atrocities* (n 13), 166.

more than ‘another name for humanitarian intervention’.<sup>110</sup> This comes through in the Just War-type criteria<sup>111</sup> that ICISS proposed that the use of armed force in RtoP cases should satisfy, specifically that the use of armed force under RtoP should have the right authority,<sup>112</sup> a just cause,<sup>113</sup> right intention,<sup>114</sup> be undertaken as a last resort,<sup>115</sup> through proportional means<sup>116</sup> and when there is a reasonable prospect of success.<sup>117</sup> In short, the criteria are central to ICISS’s efforts to formulate RtoP as that which reconciles the legality and legitimacy of the use of armed force for human protection purposes. Arguably, some of the criteria inadvertently reinforced the tension between legality and legitimacy, however. One example is ICISS’s depiction of the “right authority” requirement. ICISS acknowledged that, outside States’ exercise of the right to self-defence,<sup>118</sup> the legal use of armed force requires UNSC authority.<sup>119</sup> Recognising that political issues had prevented the UNSC from acting effectively previously,<sup>120</sup> ICISS proposed routes through which to add political and moral legitimacy to the otherwise illegal use of armed force for human protection purposes. This included (i) invoking the UNGA’s Uniting for Peace Resolution to recommend the use of armed force,<sup>121</sup> and (ii) regional organisation’s acquiring the UNSC’s approval of the use of armed force ex post facto<sup>122</sup> (i.e. repeating ECOWAS’s approach in Liberia).<sup>123</sup>

To reach a decision inside or outside the UNSC on the legitimacy of using armed force to protect a population, ICISS advised that consideration should be given to the requirement of “just cause”.<sup>124</sup> ICISS paid particular attention to this, probably because acceptance of humanitarian intervention was impeded partly by ambiguity over the specific character, nature, gravity and scale that human rights violations should have in order to warrant its application.<sup>125</sup> As noted earlier, the baseline threshold for the use of armed force was that the level of harm being sustained by a population could be described as ‘conscience-shocking’.<sup>126</sup>

<sup>110</sup> Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (n 3), 56.

<sup>111</sup> The criteria are discussed at length in chapter five.

<sup>112</sup> ICISS Report (n 8), 32 and 47-55.

<sup>113</sup> ICISS Report, *ibid*, 32-34.

<sup>114</sup> ICISS Report, *ibid*, 35-36.

<sup>115</sup> ICISS Report, *ibid*, 36-37.

<sup>116</sup> ICISS Report, *ibid*, 37.

<sup>117</sup> ICISS Report, *ibid*.

<sup>118</sup> This right is provided for in customary international law and Article 51 of the UN Charter. For a discussion of the legal development and scope of this right, see C Gray, *International Law and the Use of Force* (3rd edn OUP, Oxford 2008) 114-166.

<sup>119</sup> ICISS Report (n 8), 47-50.

<sup>120</sup> ICISS Report, *ibid*, 51-52.

<sup>121</sup> ICISS Report, *ibid*, 53.

<sup>122</sup> ICISS Report, *ibid*, 53-54.

<sup>123</sup> For a discussion of this case and the concept of ex post facto UNSC authority for the use of armed force, see e.g. Gray, *International Law and the Use of Force* (n 118) 421-423.

<sup>124</sup> ICISS Report (n 8), 32-34.

<sup>125</sup> ICISS Report, *ibid*, 32.

<sup>126</sup> ICISS Report, *ibid*, 33.



The remaining criteria received less attention but still were clearly tailored to address further elements of the humanitarian intervention debate. The “right intention” requirement targeted the tension over whether the use of armed force should have a genuine protective purpose, and on how to ensure that protective claims were not camouflage for wider political motivations like regime change.<sup>127</sup> To the ICISS, the best way to safeguard against the latter was to ensure that armed force was used collectively, not unilaterally.<sup>128</sup> ICISS adopted an essentially “sliding-scale” approach to the requisite objective of using armed force, providing that it was sufficient that protection was the key motivation for the use of armed force in cases where wider policy interests were influential.<sup>129</sup> For example, it was permissible for States to have an interest in using armed force due to an apprehension that, if force was not used, the situation inside the State could lead to humanitarian problems like heavy refugee flows.<sup>130</sup> The “last resort” requirement is self-explanatory, urging the use of armed force to be the very last reactive measure *considered*, not that *all* other measures be unsuccessfully applied first.<sup>131</sup> The “proportional means” requirement is similarly transparent, providing that the specific ways of using armed force is the minimum required in order to secure populations’ protection and, furthermore, pursuant to relevant international humanitarian law.<sup>132</sup> Finally, the “reasonable prospects” requirement encouraged decisions on the use of armed force to encompass a progressive perspective, considering whether the use of armed force represents a viable route through which to end or prevent the harm at issue.<sup>133</sup> At the same time, ICISS acknowledged that decision makers would have to assess whether the use of armed force could actually worsen the situation.<sup>134</sup> Decision makers should deem the use of armed force to lack a ‘reasonable chance of success’<sup>135</sup> if it is unlikely to ensure populations’ protection, or make matters worse.<sup>136</sup>

The “responsibility to rebuild”<sup>137</sup> was directly linked to ICISS’s provision for using armed force as a reactive measure. This component dealt with two issues, specifically (i) the safeguards which may be implemented in order to reduce the prospects of the population sustaining further harm in the immediate or longer term; and (ii) the available options regarding the status and management of a territory in which armed force has been recently used. ICISS provided that the first “rebuilding” step is to establish safeguards for the

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<sup>127</sup> ICISS Report, *ibid*, 35-36.

<sup>128</sup> ICISS Report, *ibid*, 36.

<sup>129</sup> ICISS Report, *ibid*.

<sup>130</sup> ICISS Report, *ibid*.

<sup>131</sup> ICISS Report, *ibid*.

<sup>132</sup> ICISS Report, *ibid*, 37.

<sup>133</sup> ICISS Report, *ibid*.

<sup>134</sup> ICISS Report, *ibid*.

<sup>135</sup> ICISS Report, *ibid*.

<sup>136</sup> ICISS Report, *ibid*.

<sup>137</sup> ICISS Report, *ibid*, 39-45.

population in the areas of development,<sup>138</sup> security,<sup>139</sup> justice and reconciliation.<sup>140</sup> ICISS explained that five protective tasks (minority protection,<sup>141</sup> security reform,<sup>142</sup> disarmament,<sup>143</sup> demobilisation<sup>144</sup> and reintegration,<sup>145</sup> mine action<sup>146</sup> and non-impunity for mass atrocity crimes<sup>147</sup>) cross-cut the three aforementioned areas. ICISS's discussion of territorial status and management essentially relates to the ICISS's view that intervening forces should, wherever possible, act in pursuance of the people's right to self-determination in rebuilding contexts. For example, in territories where there is no existing government, either prior to or as a result of the use of armed force, interveners should uphold the internal dimension of a people's right to self-determination by organising national elections as soon as possible.<sup>148</sup> This includes territories which have been placed under UN administration.<sup>149</sup>

Whilst the "prevent, react, rebuild" continuum<sup>150</sup> was explicitly affirmed in the HLP Report,<sup>151</sup> the former UNSG Report did so only implicitly in its recommendation for States to 'move towards embracing and acting on the "responsibility to protect" *potential or actual* victims of massive atrocities'.<sup>152</sup> The italicised terms reflect the nature of the responsibilities inherent in RtoP. Affirming that RtoP covers 'potential [...] victims'<sup>153</sup> tends to affirm that action should be taken before 'massive atrocities'<sup>154</sup> have been fully perpetrated and, therefore, that RtoP includes a "responsibility to prevent". Furthermore, providing for action to be taken in order to protect the 'actual victims of mass atrocities'<sup>155</sup> may suggest that RtoP was considered to encompass responsibilities to "react" and "rebuild".

No overarching continuum of "prevention, reaction and rebuilding" features in the Outcome Document. The Outcome Document explicitly affirms that primary RtoP entails a responsibility to prevent RtoP crimes<sup>156</sup>, 'including their incitement'<sup>157</sup> though 'appropriate and necessary means'.<sup>158</sup> In terms of secondary RtoP, the Outcome Document provides that

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<sup>138</sup> ICISS Report, *ibid*, 42-43.

<sup>139</sup> ICISS Report, *ibid*, 40-41.

<sup>140</sup> ICISS Report, *ibid*, 41-42.

<sup>141</sup> ICISS Report, *ibid*, 65.

<sup>142</sup> ICISS Report, *ibid*.

<sup>143</sup> ICISS Report, *ibid*.

<sup>144</sup> ICISS Report, *ibid*.

<sup>145</sup> ICISS Report, *ibid*.

<sup>146</sup> ICISS Report, *ibid*, 66.

<sup>147</sup> ICISS Report, *ibid*.

<sup>148</sup> ICISS Report, *ibid*, 43.

<sup>149</sup> ICISS Report, *ibid*. See generally, M Matheson, 'United Nations Governance of Postconflict Societies' (2001) 95 AJIL 76.

<sup>150</sup> HLP Report (n 10), 66.

<sup>151</sup> HLP Report, *ibid*.

<sup>152</sup> Report of the UNSG, 'In Larger Freedom' (n 11), 34-35, emphasis added.

<sup>153</sup> Report of the UNSG, *ibid*.

<sup>154</sup> Report of the UNSG, *ibid*, 35.

<sup>155</sup> Report of the UNSG, *ibid*, 34-35.

<sup>156</sup> Outcome Document (n 15), para 138.

<sup>157</sup> Outcome Document, *ibid*.

<sup>158</sup> Outcome Document, *ibid*.

the international community should (i) ‘encourage and help’<sup>159</sup> States to fulfil primary RtoP; (ii) apply peaceful measures in order to ‘help to protect’<sup>160</sup> a population from RtoP crimes; (iii) ‘take collective action, in a timely and decisive manner, through the UNSC, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate’;<sup>161</sup> and (iv) help ‘States build capacity to protect their populations’<sup>162</sup> and to assist States ‘which are under stress before crises and conflicts break out’.<sup>163</sup> Notably, the Outcome Document does not expressly provide for decisions regarding the use of armed force to satisfy the Just War-type criteria proposed in earlier Reports.<sup>164</sup> Furthermore, the only explicit reference to a preventive responsibility is, as suggested above, made in relation to the scope of primary RtoP. Nevertheless, the provision for the international community to assist States ‘before crises and conflicts break out’<sup>165</sup> may at least leave open the possibility of secondary RtoP entailing a preventive component. Conversely, the emphasis on providing assistance and capacity building ‘before’<sup>166</sup> RtoP crimes are perpetrated equally highlights that the Outcome Document does not retain a specific rebuilding responsibility.

Significantly, a fuller understanding of the structure of the RtoP framework has been developed in subsequent practice, not least the UNSG’s 2009 Report on RtoP’s implementation.<sup>167</sup> This Report divided the RtoP framework into three Pillars, specifically (i) the protection responsibilities of the State,<sup>168</sup> attributable on the basis of ‘sovereignty as responsibility’<sup>169</sup> and encouraging States to, for example, implement human rights measures effectively;<sup>170</sup> (ii) the international community’s assistance and capacity building role,<sup>171</sup> promoting the contribution that the international community can make to populations’ protection from RtoP crimes through the consensual application of, for example, consensual diplomatic or military assistance;<sup>172</sup> and (iii) the international community’s role in responding to RtoP situations in a ‘timely and decisive’<sup>173</sup> manner by applying ‘peaceful

<sup>159</sup> Outcome Document, *ibid.*

<sup>160</sup> Outcome Document, *ibid.*, para 139.

<sup>161</sup> Outcome Document, *ibid.*

<sup>162</sup> Outcome Document, *ibid.*

<sup>163</sup> Outcome Document, *ibid.*

<sup>164</sup> Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (n 3) 60.

<sup>165</sup> Outcome Document (n 15), para 139.

<sup>166</sup> Outcome Document, *ibid.*, para 139.

<sup>167</sup> Report of the UNSG, Implementing RtoP (n 32).

<sup>168</sup> Report of the UNSG, *ibid.*, 8-9. See further, UNSG’s Address, ‘Responsible Sovereignty: International Co-operation for a Changed World’ (15 July 2008, Berlin) UN Doc SG/SM/11701 and E C Luck, ‘The United Nations and the Responsibility to Protect’ (August 2008) The Stanley Foundation Policy Analysis Brief, 6-8 <<http://www.stanleyfoundation.org/policyanalysis.cfm?id=345>> accessed 8 October 2012.

<sup>169</sup> Report of the UNSG, *ibid.*, 6-7.

<sup>170</sup> Report of the UNSG, *ibid.*, 4.

<sup>171</sup> Report of the UNSG, *ibid.*, 9.

<sup>172</sup> Report of the UNSG, *ibid.*, 15.

<sup>173</sup> Report of the UNSG, *ibid.*, 9-10.

means'<sup>174</sup> or, 'should peaceful means be inadequate and national authorities are manifestly failing to protect their populations',<sup>175</sup> discharging of 'non-peaceful'<sup>176</sup> measures, including through the use of armed force which is authorised by the UNSC.<sup>177</sup>

## 2 Current Commentary on RtoP

The above stages of development generated a body of literature which broadly examines RtoP's scope, policy implications, legal status, character and interplay with existing obligations/practice. As the thesis focuses on RtoP's development in practice following the Outcome Document, the strengths and weaknesses of RtoP literature preceding its adoption at the World Summit are not given detailed consideration.<sup>178</sup> It should also be noted that a large volume of present literature considers RtoP from the perspective of international relations and political theory.<sup>179</sup> Whilst the present author draws upon some of the theoretical assessments, the thesis mainly examines RtoP from a legal perspective.

For the purposes of this thesis, present literature on RtoP can be grouped into seven broad themes, specifically (i) who owes RtoP (RtoP's bearer concept);<sup>180</sup> (ii) who can benefit from

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<sup>174</sup> Report of the UNSG, *ibid*, 22.

<sup>175</sup> Outcome Document (n 15), para 139.

<sup>176</sup> Report of the UNSG, Implementing RtoP (n 32), 22.

<sup>177</sup> Report of the UNSG, *ibid*, 25.

<sup>178</sup> Prominent examples include, J Levitt, 'The Responsibility to Protect: A Beaver without a Dam?' (2003-2004) 25 Mich. J. Int'l L 153 and I Williams, 'Writing the Wrongs of Past Interventions: A Review of the International Commission on Intervention and State Sovereignty' (2002) 6 (3) Int. J. Hum. Rts. 103.

<sup>179</sup> See especially, D Chandler, 'The Paradox of the Responsibility to Protect' (2010) 45 (1) Cooperation and Conflict 128; D Chandler, 'The Responsibility to Protect: Imposing the Liberal Peace?' (2004) 11 (1) International Peacekeeping 59; Oman (n 33); A Orford, 'Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect' (2008-2009) 30 Mich. J. Int'l L. 981; J Pattison, 'Legitimacy and Humanitarian Intervention: Who Should Intervene?' (2008) 12 (3) Int. J. Hum. Rts 395; J Pattison, 'Humanitarian Intervention, the Responsibility to Protect and Jus in Bello' (n 3); P Cunliffe (ed), *Critical Perspectives on the Responsibility to Protect: Interrogating Theory and Practice* (Routledge, Abingdon 2011); Orford, *International Authority and the Responsibility to Protect* (n 53); Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (n 3); K Engle, 'Calling in the Troops: The Uneasy Relationship between Women's Rights, Human Rights and Humanitarian Intervention' (2007) 20 Harv Hum Rts J 189 and Hehir, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention* (n 3).

<sup>180</sup> The following are prominent examples of commentary on RtoP's bearer concept: L Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 Review of International Studies 445; S Rosenberg, 'Responsibility to Protect: A Framework for Prevention' in Bellamy, Davies and Glanville (n 18), 191; M Kalkman, 'Responsibility to Protect: A Bow Without an Arrow?' (2009) 5 Cambridge Student Law Review 75; Strauss, 'A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect' (n 53), 51-54; P Akhavan, 'Preventing Genocide: Measuring Success by What Does Not Happen' (2011) 22 (1) Crim. L. F. 1, 13-16; Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 11); Payandeh (n 53), 499-501; Peters, 'Humanity as the Alpha and Omega of Sovereignty' (n 53), 539; H Nasu, 'Operationalising the Responsibility to Protect and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict' (2009) 14 (2) Journal of Conflict and Security Law 209, 216-234; Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (n 3), 15-20; Cunliffe, *ibid*, 55; K Tan, 'The Duty to Protect' in T Nardin and M Williams (eds), *Humanitarian Intervention* (New York University Press, New York 2006) 95; Welsh and Banda (n 53), 217-226; L Glanville, 'The International Community's Responsibility to Protect' in S E Davies and L Glanville (eds), *Protecting the Displaced: Deepening the Responsibility to Protect* (Martinus Nijhoff, Leiden 2010) 295-297; S Koko, 'Whose Responsibility to Protect? Reflections on the Dynamics of an 'Abandoned Disorder' in Somalia' (2007) 16 (3) African Security Review 2.

the protection offered by RtoP (RtoP's beneficiary concept);<sup>181</sup> (iii) the scope, duration and value added of primary RtoP;<sup>182</sup> (iv) the nature, character and scope of secondary RtoP's activation;<sup>183</sup> (v) the scope and value added of secondary RtoP;<sup>184</sup> (vi) the legal status and

<sup>181</sup> The following are useful examples of the treatment of RtoP's beneficiary concept by commentators: W Pace and N Deller, 'Preventing Future Genocides: An International Responsibility to Protect' (2005) 36 (4) World Order 15, 26; N Wheeler, *Operationalising the Responsibility to Protect: The Continuing Debate Over where Authority should be Located for the Use of Force* (Norwegian Institute for International Affairs, Oslo 2008) 16; Peters, 'Humanity as the Alpha and Omega of Sovereignty' (n 53), 522; N Wheeler and F Egerton, 'The Responsibility to Protect: 'Precious Commitment' or a Promise Unfulfilled?' (2009) 1 GRtoP 114, 123; E C Luck, 'The Normative Journey: The Evolution of the RtoP Concept' (Keynote address, European Science Foundation Conference 'The Responsibility to Protect from Principle to Practice' Linköping, June 2010); Luck, 'The United Nations and the Responsibility to Protect' (n 168); R Cohen, 'Reconciling RtoP with IDP Protection' (2010) 2 GRtoP 15; The Editors, 'Special Issue for GRtoP: Protecting IDPs and Refugees' (2010) 2 GRtoP 5, 7; E Mooney, 'Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts Between RtoP and IDP Protection' (2010) 2 GRtoP 60; N Otsuki and N Turner, *The Responsibility to Protect Minorities and the Problem of the Kin State* (UN University, Tokyo 2010); W Kemp, V Popovski and R Thakur (eds), *Blood and Borders: The Responsibility to Protect and the Problem of the Kin-State* (UN University Press, Tokyo 2011); H Charlesworth, 'Feminist Reflections on the Responsibility to Protect' (2010) 2 (3) GRtoP 232; J Bond and L Sherret, 'Mapping Gender and the Responsibility to Protect: Seeking Intersections, Finding Parallels' (2012) 4 (2) GRtoP 133; I Skjelsbaek, 'Responsibility to Protect or Prevent? Victims and Perpetrators of Sexual Violence Crimes in Armed Conflicts' (2012) 4 (2) GRtoP 154; E Stamnes, 'The Responsibility to Protect: Integrating Gender Perspectives into Policies and Practices' (2012) 4 (2) GRtoP 172; S E Davies and S Teitt, 'Engendering the Responsibility to Protect: Women and the Prevention of Mass Atrocities' (2012) 4 (2) GRtoP 198; J Karlsrud and R Solhjell, 'Gender-Sensitive Protection and the Responsibility to Prevent: Lessons from Chad' (2012) 4 (2) GRtoP 223; S Dharmapuri, 'Implementing UN Security Resolution 1325: Putting the Responsibility to Protect into Practice' (2012) 4 (2) GRtoP 241 and S Whitman, 'The Responsibility to Protect and Child Soldiers' in Knight and Egerton (n 18), 152-166.

<sup>182</sup> Examples include: Hehir, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention* (n 3) 74; Strauss, 'A Bird in the Hand is Worth Two in the Bush' (n 53), 48-51; A Bellamy and R Reike 'The Responsibility to Protect and International Law' in Bellamy, Davies and Glanville (n 18), 89-94; Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 11), 118; D Gierczyk, 'The Responsibility to Protect: A Legal and Rights-Based Perspective' in Bellamy, Davies and Glanville (n 18), 101-118; L Feinstein, 'Darfur and Beyond: What is Needed to Prevent Mass Atrocities' (2007) 22 Council on Foreign Relations 1; Otsuki and Turner (n 181); Kemp, Popovski and Thakur, *ibid*; J Sarkin, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organisations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect' (2009) 53 (1) Journal of African Law 1, 12 and E Aba and M Hammer, *Yes We Can? Options and Barriers to Broadening the Scope of the Responsibility to Protect to include Cases of Economic Social and Cultural Rights Abuses* (One World Trust, London 2009) 1-24.

<sup>183</sup> The competing approaches adopted to this issue in present literature can be found in: Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 180), 449; E C Luck, 'The Responsibility to Protect: The First Decade' (2011) 3 GRtoP 387, 394; Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (n 13), 90; D Amneus, *Responsibility to Protect and the Prevention of Genocide: A Right to Humanitarian Intervention?* (The Living History Forum, Stockholm 2008) 19; Rosenberg and Strauss (n 50); A Bellamy, 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq' (2005) 19 Eths & Int Affs 31; Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 11); C Stahn, 'RtoP, the ICC and the Libyan Arrests' (*The Hague Justice Portal*, 24 November 2011) <<http://www.haguejusticeportal.net/index.php?id=12998>> accessed 12 May 2012; Payandeh (n 53) and N Wheeler, 'A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit' (Paper presented at 'The UN at Sixty: Celebration or Wake?' conference, University of Toronto, 6-7 October 2005), 8 <<http://cadair.aber.ac.uk/dspace/bitstream/2160/1971/1/a%20victory%20for%20common%20humanity,%20Wheeler.pdf>> accessed 12 May 2012.

<sup>184</sup> Prominent sources include: Sarkin, 'The Role of the United Nations' (n 182), 12; J Volk et al, 'Building Structures for Peace: A Quaker Lobby Offers Strategies for Peacemakers' in R Cooper and J Kohler (eds) *Responsibility to Protect: The Global Moral Compact for the 21st Century* (Palgrave Macmillan, New York 2009) 199-218; J Sarkin, 'Is the Responsibility to Protect an Accepted Norm of International Law in the Post-Libya Era? How its Third Pillar Ought to Be Applied' (2012) 1 Groningen Journal of International Law 11, 26-35; A Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention' (2008) 84 (4) Eths and Int Affs 615, 634; S Sharma, 'Toward a Global Responsibility to Protect: Setbacks on the Path to Implementation' (2010) 16 Global Governance 121; Oman (n 33), 366-367; A Bellamy, 'Conflict Prevention and the Responsibility to Protect' (2008) 14 (2) Global Governance 135, 143-44; Bellamy, *The Responsibility to Protect: The Global Effort to End Mass Atrocities* (n 13) 98-131; A Bellamy, 'Realising the Responsibility to

character of RtoP;<sup>185</sup> and (vii) the relationship between RtoP and minority protection.<sup>186</sup> The aforementioned themes in present literature are discussed in detail in the substantive chapters. Accordingly, it is sufficient for present purposes to outline the principal trends in present literature regarding each theme in order to identify at the outset the key issues which this writer considers merit further reflection because (i) such issues receive limited attention in present literature, despite their potential significance; or (ii) the standpoints taken to the issues in present literature merit revisiting in the light of relevant practice.

## 2.1 RtoP's Bearer Concept

In present literature, limited attention is given to the significance and potential implications of the Outcome Document providing that '[e]ach individual State'<sup>187</sup> and, more specifically, 'national authorities',<sup>188</sup> bear primary RtoP. Most commentators<sup>189</sup> simply reiterate that *States* are required to protect their populations from RtoP crimes. However, in international law the term "State" is usually used with respect to territories which meet the criteria for *statehood*.<sup>190</sup> Accordingly, there is the question of whether "State" is used in its legal sense in the Outcome Document and, if so, whether primary RtoP is owed by the national authorities of territories which do not meet the criteria for statehood, such as secessionist enclaves.

Russia's claim to have a responsibility to protect its citizens residing in South Ossetia,<sup>191</sup> a secessionist enclave located inside Georgia, prompted discussion of the territorial scope of

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Protect' (2009) 10 (2) *International Studies Perspectives* 111, 120; M Matthews, 'Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur' (2008) 31 *Boston College International and Comparative Law Review* 137, 150-52.

<sup>185</sup> Key examples are: Bellamy and Reike (n 182), 89-94; N S MacFarlane, C J Thielking and T G Weiss, 'The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?' (2004) 25 (5) *Third World Quarterly* 977; Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (n 3), 223-41; Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 180), 456; Feinstein (n 182), 46-48; Welsh and Banda (n 53), 225; S Breau, 'The Impact of the Responsibility to Protect on Peacekeeping' (2007) 11 (3) *Journal of Conflict & Security Law* 429, 440 and 464; Nasu (n 180), 219; Payandeh (n 53); Strauss, "A Bird in the Hand is Worth Two in the Bush" (n 53), 25-57; Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 11) and G Shaffer and M Pollack, 'Hard Versus Soft Law in International Security' (2011) 52 *Boston College Law Review* 1147.

<sup>186</sup> The main discussion of this relationship can be found in: Kemp, Popovski and Thakur (n 181); Schabas (n 58) and Otsuki and Turner (n 181).

<sup>187</sup> Outcome Document (n 15), para 138.

<sup>188</sup> Outcome Document, *ibid*.

<sup>189</sup> The majority of commentators affirm this. See for e.g. Hehir, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention* (n 3) 69-74; Amneus (n 183), 14; R Thakur, 'Behind the Headlines: Iraq and the Responsibility to Protect' (2004) 62 (1) *Canadian Institute of International Affairs* 1, 8 and Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (n 13) 96.

<sup>190</sup> It is commonly accepted that the criteria for statehood are reflected in Montevideo Convention on the Rights and Duties of States (1933) (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 art 1 (Montevideo Convention). The Article requires that a "State" have (i) a permanent population; (ii) defined territory; (iii) government; and (iv) the capacity to enter into relations with other States.

<sup>191</sup> '[U]nder the Constitution [the President] is obliged to protect the life and dignity of Russian citizens, especially when they find themselves in the armed conflict. And today he reiterated that the peace enforcement

RtoP. Evans<sup>192</sup> and Ruys<sup>193</sup> assert that RtoP does not relate to the wider concept of the protection of nationals abroad, thereby suggesting that States' national authorities owe primary RtoP to persons located within their territorial borders. Thakur<sup>194</sup> left the question open, pointing to its complexity and need for further consideration:

‘If a State has the responsibility to protect citizens and foreigners alike on its territory, does it not also have the correlative duty to protect its individual citizens caught in danger on foreign soil?’<sup>195</sup>

Thakur's question raises a host of issues which merit reflection in light of practice, not least whether State responses to Russia's claim uphold the view that a State has a responsibility to protect its citizens residing in the territory of another State. If so, under what circumstances is this responsibility acquired? What are the potential implications of the approaches taken to the territorial scope of primary RtoP in practice to date? What do these approaches suggest about RtoP's relationship with existing obligations/practice?

The Outcome Document's reference to the “international community”<sup>196</sup> as the entity which should discharge secondary RtoP is commonly discussed in present RtoP literature. Generally, commentators<sup>197</sup> examine whether the *width* and *indeterminacy* of the term “international community”<sup>198</sup> impedes secondary RtoP having the character of a *duty* because it does not identify a solitary bearer. The present author considers that it is useful to examine this issue in more depth, if only to determine the kind of considerations which underscored the decision *not* to identify a solitary bearer of secondary RtoP and, furthermore, the possible advantages and disadvantages of this decision. For example, does providing for secondary

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operation enforcing peace on one of the parties which violated its own obligations would continue until we achieve the results. According to our Constitution there is also responsibility to protect – the term which is very widely used in the UN when people see some trouble in Africa or in any remote part of other regions. But this is not Africa to us, this is next door. This is the area, where Russian citizens live. So the Constitution of the Russian Federation, the laws of the Russian Federation make it absolutely unavoidable to us to exercise responsibility to protect’. “Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC” (*Ministry of Foreign Affairs of the Russian Federation*, Moscow, 9 August 2008) <[www.ln.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcb3/f87a3fb7a7f669ebc32574a100262597?OpenDocument](http://www.ln.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcb3/f87a3fb7a7f669ebc32574a100262597?OpenDocument)> accessed 11 May 2012

<sup>192</sup> G Evans, ‘Russia, Georgia and the Responsibility to Protect’ (2009) 2 (1) *Amsterdam Law Forum* 25 <<http://ojs.ubvu.vu.nl/alf/article/view/58/115>> accessed 12 May 2012.

<sup>193</sup> T Ruys, ‘The “Protection of Nationals” Doctrine Revisited’ (2008) 13 (2) *Journal of Conflict & Security Law* 233, 267–68.

<sup>194</sup> R Thakur, “The Responsibility to Protect and the North-South Divide” in R Thakur, *The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics* (Routledge, Abingdon 2011).

<sup>195</sup> Thakur, *ibid*, 154.

<sup>196</sup> Outcome Document (n 15), paras 138–139.

<sup>197</sup> See especially, Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’ (n 180); Rosenberg, “Responsibility to Protect: A Framework for Prevention” (n 180), 191; Strauss, “A Bird in the Hand is Worth Two in the Bush” (n 53), 51–54; Akhavan (n 180), 13–16; Payandeh (n 53), 499–501; Peters, ‘Humanity as the Alpha and Omega of Sovereignty’ (n 53), 539; Nasu (n 180), 216–234; Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (n 3), 15–20; Tan (n 180), 95; Welsh and Banda (n 53), 217–226; Cunliffe (n 179), 55 and Glanville, “The International Community’s Responsibility to Protect” (n 180), 295–297.

<sup>198</sup> On the conceptualisation of the “international community” more generally, see e.g. D Kritsiosis, ‘Imagining the International Community’ (2002) 13 (4) *EJIL* 961 and G Abi-Saab, ‘Whither the International Community?’ (1998) 9 *EJIL* 248.

RtoP to be discharged by the “international community”, not a specific member thereof, make its discharge more flexible?

## 2.2 RtoP’s Beneficiary Concept

In present literature, the majority of commentators either affirm the Outcome Document’s “populations”<sup>199</sup> beneficiary concept or that used in earlier RtoP Reports, such as “citizens”.<sup>200</sup> Given that States accepted the final text of the Outcome Document, affirming its beneficiary concept seems reasonable. Nevertheless, the fact that RtoP’s beneficiary concept was altered between 2001 and 2005 prompts consideration of whether the concept has undergone any *further refinement* in subsequent practice and the significance and potential implications thereof.

## 2.3 The Scope, Duration and Value Added of Primary RtoP

Whilst most commentators<sup>201</sup> recognise that primary RtoP is a central component of the RtoP, the general view is that primary RtoP (i) merely restates States’ existing human rights, criminal and humanitarian law obligations,<sup>202</sup> and/or (ii) requires States to comply with and enforce the aforesaid existing obligations effectively.<sup>203</sup> Whilst this strand of literature usefully delineates primary RtoP’s legal basis, it suggests that primary RtoP merely repackages States existing protection duties and, therefore, sets aside the question of whether primary RtoP *adds value* to these obligations. In addition, focusing on the way in which

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<sup>199</sup> The majority of commentators restate this. However, the following are useful examples: Wheeler, *Operationalising the Responsibility to Protect* (n 181), 16; Peters, ‘Humanity as the Alpha and Omega of Sovereignty’ (n 53), 522 and Wheeler and Egerton (n 181), 123.

<sup>200</sup> See for e.g. Amneus (n 183), 14; A M Slaughter, ‘Security, Solidarity and Sovereignty: The Grand Themes of UN Reform’ (2005) 99 (3) AJIL 619, 620; Thakur, ‘Behind the Headlines’ (n 189), 7 and Charlesworth (n 181), 234.

<sup>201</sup> Hehir, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention* (n 3) 69-74; Strauss, ‘A Bird in the Hand is Worth Two in the Bush’ (n 53), 48-51; Bellamy and Reike (n 182), 89-94; Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (n 11), 118; Gierczyk (n 182), 101-118; E McClean, ‘The Responsibility to Protect: The Role of International Human Rights Law’ (2008) 13 (1) *Journal of Conflict and Security Law* 123; Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’ (n 180), 448; Mooney (n 181), 84; Cohen, ‘Reconciling RtoP with IDP Protection’ (n 181), 26; H Slim, ‘Value versus Power: Responsible Sovereignty as Struggle in Zimbabwe’ (2010) 2 *GRtoP* 150; Feinstein (n 182), 10; Oman (n 33), 374-78 and Peters, ‘Humanity as the Alpha and Omega of Sovereignty’ (n 53), 541.

<sup>202</sup> See particularly, Hehir, *ibid*, 74; Strauss, ‘A Bird in the Hand is Worth Two in the Bush’, *ibid*; Bellamy and Reike, *ibid*; Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’, *ibid* and Gierczyk, *ibid*, 101-118.

<sup>203</sup> For e.g. McClean (n 201); Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’ (n 180), 448; Mooney (n 181), 84; Cohen, ‘Reconciling RtoP with IDP Protection’ (n 181), 26; Feinstein (n 182), 10; Oman (n 33), 374-78 and Peters, ‘Humanity as the Alpha and Omega of Sovereignty’ (n 53), 541.



primary RtoP encourages States to ensure that ‘fundamental human rights’<sup>204</sup> are protected more effectively, leaves open the issue of whether *certain* human rights may bear more importance under primary RtoP than others.

Other commentators<sup>205</sup> raise arguments which have a particular bearing on the duration of primary RtoP. Commentators<sup>206</sup> like Stahn<sup>207</sup> contend that the Outcome Document criteria of manifest failure and the inadequacy of peaceful means create a ‘complementarity trap’<sup>208</sup> in the RtoP framework, triggering debate over whether the State *or* the international community is responsible for protecting populations. Conversely, Bellamy<sup>209</sup> refers to primary RtoP as an ‘enduring’<sup>210</sup> duty of States, suggesting that States primary RtoP duty subsists irrespective of whether secondary RtoP has been activated. The varying standpoints taken to the issue in present literature generate a range of questions which warrant assessment in the light of relevant practice. Which view, if any, best reflects the approach taken to primary RtoP’s duration in practice to date? What reasons underscore the approach taken?

## 2.4 The Nature, Character, Scope and Value Added of Secondary RtoP’s Activation

Two main approaches are taken to the activation of secondary RtoP in present literature. Commentators, including Charlesworth,<sup>211</sup> Luck<sup>212</sup> and Arbour,<sup>213</sup> tend to adopt a descriptive approach to the issue, affirming either the activating threshold used in earlier RtoP Reports<sup>214</sup>

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<sup>204</sup> Luck, ‘The United Nations and the Responsibility to Protect’ (n 168), 2.

<sup>205</sup> Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (n 11), 116-117; Wheeler, ‘A Victory for Common Humanity?’ (n 183), 8-9; Bellamy, ‘Responsibility to Protect or Trojan Horse?’ (n 183), 43; Payandeh (n 53), 498; Stahn, ‘RtoP, the ICC and the Libyan Arrests’ (n 183); Peters, ‘Humanity as the Alpha and Omega of Sovereignty’, *ibid*; R Cohen, ‘Strengthening Protection of IDP’s: The UN’s Role’ (2006) 7 (1) *Georgetown Journal of International Affairs* 101; Nasu (n 180); Kalkman (n 180); V Holt and T Berkman, *The Impossible Mandate? Military Preparedness, The Responsibility to Protect and Modern Peace Operations* (The Henry L. Stimson Centre, Washington D.C. 2006); McClean (n 201); Otsuki and Turner (n 181) and Gierczyk (n 182), 192.

<sup>206</sup> See especially, Bellamy, ‘Responsibility to Protect or Trojan Horse?’, *ibid*; Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’, *ibid*; Stahn, ‘RtoP, the ICC and the Libyan Arrests’, *ibid*; Payandeh, *ibid* and Wheeler, ‘A Victory for Common Humanity?’, *ibid*, 8.

<sup>207</sup> Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’, *ibid*.

<sup>208</sup> Stahn, *ibid*, 116.

<sup>209</sup> A Bellamy, ‘The Conflict in Sri Lanka and the Responsibility to Protect’ (*e-International Relations*, 1 May 2009) <<http://www.e-ir.info/2009/05/01/the-conflict-in-sri-lanka-and-the-responsibility-to-protect/>> accessed 10 October 2010. Gierczyk comments that primary RtoP amounts to the ‘continuing’ responsibility of States to protect their populations from RtoP crimes. Gierczyk (n 182), 192.

<sup>210</sup> Bellamy, ‘The Conflict in Sri Lanka and the Responsibility to Protect’, *ibid*.

<sup>211</sup> Charlesworth (n 181), 234.

<sup>212</sup> Luck, ‘The Responsibility to Protect: The First Decade’ (n 183), 394.

<sup>213</sup> Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’ (n 180), 449.

<sup>214</sup> Two illustrations of this approach are, Thakur, ‘Behind the Headlines’ (n 189), 7 and Charlesworth (n 181), 234.

or the Outcome Document.<sup>215</sup> Other commentators adopt a prescriptive approach, considering the more intricate issues surrounding secondary RtoP's activation. Wong<sup>216</sup> is one example, recommending that legal understandings of the mass atrocity crimes to which RtoP relates be drawn upon in the course of decision making on whether to apply secondary RtoP. This raises the question of whether the legal basis of RtoP *has influenced* decision making on secondary RtoP's activation in practice and, if so, to what extent. For example, is consideration given to *both* the *actus reus* and *mens rea* elements of RtoP crimes in decisions on secondary RtoP's activation?

Scheffer<sup>217</sup> also draws upon the legal definitions of RtoP crimes, suggesting that secondary RtoP's activation overlaps with the substantiality test used to determine whether a crime is of sufficient gravity to fall within the ICC's jurisdiction. This argument raises significant questions which warrant further reflection. Does practice sustain the view that secondary RtoP's activation depends on the presence of similar factors to the substantiality test? Is there scope to argue that there is some divergence between the two? For example, are all of the acts which fall within the ICC's jurisdiction also able to activate secondary RtoP?

Rosenberg and Strauss<sup>218</sup> provide perhaps the most detailed assessment of secondary RtoP's activation to date and raise a range of issues for consideration. Two arguments merit particular consideration in the body of the thesis. The first is the evidential issues which can arise if secondary RtoP's activation is based upon the prospect of RtoP crimes arising in the future. Rosenberg and Strauss consider that such an approach requires decision makers to essentially *predict* what harm a population may sustain if the international community does not act promptly,<sup>219</sup> thereby creating a risk that decision makers may overrate or underrate the potential harm. This raises questions of an evidential nature which warrant further examination. For example, are there any existing techniques which could help to guard against miscalculations regarding the harm which will quite likely be sustained by a population if secondary RtoP is not activated?

The second argument is of a more substantive nature. Rosenberg and Strauss consider that drawing upon the legal elements of RtoP crimes to determine secondary RtoP's activation would 'ensure the immediate demise'<sup>220</sup> of RtoP's preventive capacity. To the present author, this view raises a host of interesting questions for evaluation. Does practice suggest that it possible for secondary RtoP to be activated for preventive purpose *and* be

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<sup>215</sup> For e.g. Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 180), 449 and Luck, 'The Responsibility to Protect: The First Decade' (n 183), 394.

<sup>216</sup> J Wong, 'Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism' (2009) 84 (2) Tulane Law Review 219.

<sup>217</sup> Scheffer, "Atrocity Crimes Framing the Responsibility to Protect" in Cooper and Kohler (n 184).

<sup>218</sup> See especially, Rosenberg and Strauss (n 50), 55-72.

<sup>219</sup> Rosenberg and Strauss, *ibid*, 58 and Scheffer, "Atrocity Crimes Framing the Responsibility to Protect" (n 217), 93.

<sup>220</sup> Rosenberg and Strauss, *ibid*, 55.

influenced by the legal elements of RtoP crimes? Could this approach be beneficial at a policy level by, for example, alleviating States concerns that secondary RtoP will be discharged *before* indicators of possible RtoP crimes emerge in the State?

## 2.5 The Scope and Value Added of Secondary RtoP

Present literature on secondary RtoP can be broadly divided into five main themes. The first theme is the *scope* of secondary RtoP's means of discharge. Particular attention has been given to the nature of the measures which can be used to prevent RtoP crimes from arising in a State. Commentators<sup>221</sup> are divided on this issue. Whilst Sarkin<sup>222</sup> and Rimmer<sup>223</sup> consider that priority should be given to structural prevention measures which address the root causes of RtoP crimes, Bellamy<sup>224</sup> and Oman<sup>225</sup> favour operational measures which come into effect after the population has sustained some harm. The divide in academic opinion merits consideration in the light of State positions on the form of preventive measures which should be used to discharge secondary RtoP and, furthermore, the possible issues which underscore where State consensus on this issue lies presently.

The second theme relates to the more *specific* elements of secondary RtoP's discharge. There is some discussion of the steps which the international community can take to ensure that the assistance offered is discharged in practice, particularly by coercing State consent to its provision by threatening the use of non-peaceful measures if consent is not forthcoming.<sup>226</sup> The significant question which arises from this line of argument is whether it will always be appropriate to look to the *State* to provide consent, not least in cases where the government is perpetrating RtoP crimes. Does practice suggest that the international community may identify *other actors* within the State as *legitimate recipients* of assistance?

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<sup>221</sup> For e.g. Sarkin, 'The Role of the United Nations' (n 182), 12; Volk (n 184), 199-218; Sarkin, 'Is the Responsibility to Protect an Accepted Norm of International Law in the Post-Libya Era?' (n 184) 26-35; S Rimmer, 'Refugees, Internally Displaced Persons and the "Responsibility to Protect"' (March 2010) New Issues in Refugee Research, Research Paper No 185, UNHCR; Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention' (n 184), 634; Sharma, 'Toward a Global Responsibility to Protect' (n 184), 121-138; Oman (n 33), 366-367; Bellamy, 'Conflict Prevention and the Responsibility to Protect' (n 184), 143-44; Bellamy, *The Responsibility to Protect: The Global Effort to End Mass Atrocities* (n 13), 98-131 and Bellamy, 'Realising the Responsibility to Protect' (n 184), 120.

<sup>222</sup> Sarkin, 'The Role of the United Nations', *ibid* and Sarkin, 'Is the Responsibility to Protect an Accepted Norm of International Law in the Post-Libya Era?', *ibid*.

<sup>223</sup> Rimmer (n 221).

<sup>224</sup> Bellamy, 'Realising the Responsibility to Protect' (n 184); Bellamy, 'Conflict Prevention and the Responsibility to Protect' (n 184) and Bellamy, *The Responsibility to Protect: The Global Effort to End Mass Atrocities* (n 13), 98-131.

<sup>225</sup> Oman (n 33).

<sup>226</sup> See particularly, Matthews (n 184), 150-52; A Bellamy, 'The Responsibility to Protect: Five Years On' (2010) 2 *Ethics and International Affairs* 143, 147-53 and Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention' (n 184), 634.

If so, is there scope to suggest that new routes through which to coerce State cooperation with the international community on the provision of assistance may be emerging?

In this section of present literature, particular attention is also given to whether the Just War-type criteria proposed by the ICISS should inform decision making on the use of armed force. Different approaches are adopted here. One view (defended strongly by members of the ICISS like Evans<sup>227</sup>) is that the criteria are central to RtoP's effectiveness because they establish the parameters of a legitimate and legal use of armed force for human protection purposes.<sup>228</sup> In contrast, Bellamy<sup>229</sup> expresses concern over the extent to which the criteria could guide decision making in practice constructively, suggesting that they could instead impede decisive decision making by simply providing new rules for the UNSC to debate.<sup>230</sup> The present author considers that the potential merits of adopting the criteria warrant assessment in light of decision making on the use of armed force in Libya. Are the criteria necessary in contemporary international relations? Does Libya suggest that the criteria could further complicate the decision making process?

The third theme is the extent to which secondary RtoP's means of discharge are *novel*. Commentators<sup>231</sup> tend to focus on whether secondary RtoP introduces any changes to the existing regime on armed force, particularly whether it alters the requirement for UNSC authorisation. Whilst Libya has prompted assertions that RtoP strengthens the use of armed force for the specific purpose of human protection,<sup>232</sup> commentators<sup>233</sup> generally conclude that secondary RtoP reiterates the UN Charter's provisions for the UNSC to authorise Chapter VII enforcement measures in order to maintain international peace and security. Whilst assessing RtoP's interaction with the existing regime on armed force is of fundamental importance, it tends to set aside the question of whether other components of

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<sup>227</sup> Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (n 3), 128-148.

<sup>228</sup> For e.g. Thakur, 'Behind the Headlines' (n 189), 13; Pace and Deller (n 181), 29; Kalkman (n 180), 85; Nasu (n 180), 223; MacFarlane, Thielking and Weiss (n 185), 988; R Thakur, 'In Defence of the Responsibility to Protect' (2003) 7 (3) Int. J. Hum. Rts. 160, 163 and Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 180).

<sup>229</sup> Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention' (n 184).

<sup>230</sup> Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention', *ibid*, 627.

<sup>231</sup> See particularly, Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (n 3), 223-41; Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 180), 456; Feinstein (n 182), 46-48; Welsh and Banda (n 53), 225; Breau (n 185), 440 and 464; Nasu (n 180), 219; McClean (n 201), 129; J McCarthur, 'A Responsibility to Rethink? Challenging Paradigms in Human Security' (2008) 63 Int'l J. 422, 431-33; Wheeler and Egerton (n 181), 128-29; Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (n 3), 166; Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 11), 109; Payandeh (n 53), 507-508; A Bannon, 'The Responsibility to Protect and the Question of Unilateralism' (2006) 115 Yale L. J. 1157 and J F Thibault, 'Military Intervention and the Indeterminacy of the Responsibility to Protect' (2008) 7 Human Security Journal 8.

<sup>232</sup> For e.g. J Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP' (2011) 25 (3) *Ethics & Int Affs* 255, 258-260 and A Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) 25 (3) *Ethics & Int Affs* 263, 263-264.

<sup>233</sup> See for e.g. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (n 3), 223-41; Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 180), 456; Breau (n 185), 440 and 464; Nasu (n 180), 219; McClean (n 201), 129; McCarthur (n 231), 431-33; Schabas (n 58), 14 and Wheeler and Egerton (n 181), 128-29.

secondary RtoP are novel. For example, is there scope to suggest that secondary RtoP may alter traditional interpretations of the principle of neutrality in civil wars?

The fourth theme relates to the *potential implications* of secondary RtoP's discharge. For example, commentators discuss secondary RtoP's interplay with regime change,<sup>234</sup> its capacity to "internationalise" human protection,<sup>235</sup> to leave open the possibility of using armed force which has not been authorised by the UNSC<sup>236</sup> and whether RtoP encourages so-called "suicidal rebellions".<sup>237</sup> Each of these potential implications merits deeper consideration, given the significant bearing which these controversial issues could have on secondary RtoP's political palatability and, furthermore, RtoP's interaction with the existing international legal and political framework. At the same time, the present author considers that there is a need to examine whether secondary RtoP can circumvent all of these implications *and* protect populations from RtoP crimes.

Finally, particular consideration is given to the routes through which to overcome impediments to secondary RtoP's discharge, specifically the UNSC's failure to authorise the requisite protective action. Proposals include using the UN General Assembly Uniting for Peace Resolution to recommend the use of collective measures, such as sanctions<sup>238</sup> and armed force,<sup>239</sup> to protect a population. Bellamy has also proposed that the risk of the UNSC failing to authorise the use of armed force, at least in a 'timely and decisive'<sup>240</sup> manner, may be overcome by coalitions of the willing or regional organisations invoking the concept of revived UNSC authorisation.<sup>241</sup> These recommendations raise several issues for examination, including whether either proposal has State support and/or is compatible with the Outcome Document. In addition, there is the question of whether other steps to circumvent the UNSC's failure to act have emerged in country-specific practice, such as Syria.

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<sup>234</sup> See especially, A Bellamy, 'The Responsibility to Protect and the Problem of Regime Change' (*e-International Relations*, 27 September 2011) <[www.e-ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change/](http://www.e-ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change/)> accessed 12 July 2012; A Bellamy, 'Stopping Genocide and Mass Atrocities: The Problem of Regime Change' (*Protection Gateway*, 6 July 2012) <<http://protectiongateway.com/2012/07/06/stopping-genocide-and-mass-atrocities-the-problem-of-regime-change/>> accessed 12 July 2012 and L Arbour, 'For Justice and Civilians, Don't Rule Out Regime Change' *The Globe and Mail* (Toronto, 26 June 2012) <<http://www.theglobeandmail.com/commentary/for-justice-and-civilians-dont-rule-out-regime-change/article4372211/>> accessed 12 July 2012.

<sup>235</sup> S Nouwen, 'RtoP and Complementarity: Critical Lessons from the Practice of the ICC' (Paper presented at the European Science Foundation 'The Responsibility to Protect: From Principle to Practice' conference, Linköping, Sweden, 10 June 2010) and F Megret, 'Beyond the 'Salvation' Paradigm: Responsibility to Protect (Others) vs. the Power of Protecting Oneself' (2009) 40 *Security Dialogue* 575.

<sup>236</sup> Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (n 3), 166; Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 11), 109 and Payandeh (n 53), 507-508.

<sup>237</sup> A J Kuperman, 'The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans' (2008) 52 *International Studies Quarterly* 49 and Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention' (n 184), 631-632.

<sup>238</sup> Payandeh (n 53), 504-505.

<sup>239</sup> See particularly, Thakur, 'Behind the Headlines' (n 189), 13; Breau (n 185), 434; Pace and Deller (n 181), 29; Kalkman (n 180), 85 and N Wheeler, 'Legitimizing Humanitarian Intervention: Principles and Procedures' (2001) 2 *Melbourne Journal of International Law* 1, 12, 16 and 17.

<sup>240</sup> Outcome Document (n 15), para 139.

<sup>241</sup> Bellamy, *The Responsibility to Protect: The Global Effort to End Mass Atrocities* (n 13), 91.

## 2.6 Legal Status and Character

Present literature does not consider the legal status and character of primary RtoP as a responsibility in its own right, quite likely because of the general presumption that it merely reaffirms States' existing human rights, humanitarian and criminal law obligations.<sup>242</sup> The present author considers that isolating primary RtoP's legal significance and character to the existing obligations of States to which it relates tends to set aside the fact that, since 2005, a whole body of practice has developed with respect to primary RtoP. Accordingly, it is useful to examine whether the existing views on primary RtoP's legal significance and character may merit reconsideration in the light of practice.

Different views are taken to secondary RtoP's legal status. One view is that secondary RtoP could become new customary international law *in the future*.<sup>243</sup> Another perspective is that secondary RtoP lacks legal status in its own right but, as it relates to a range of existing obligations like those in the UN Charter, entails legally binding elements.<sup>244</sup> The common view is that secondary RtoP is not a new legal obligation but a moral responsibility which adds force to the existing legal obligations to which it relates and, consequently, that the Outcome Document may represent soft law.<sup>245</sup> Notably, limited attention is given to *States views* on the legal nature of secondary RtoP in these assessments. Thus, there remains the question of what State views on RtoP between 2005 and 2012 suggest about the way in which States perceive secondary RtoP's legal significance. Do States consider secondary RtoP to constitute new customary international law and/or create new interpretations to the existing treaty obligations to which it relates, such as the UNSC veto power?

Competing views are also taken to secondary RtoP's character. Some commentators assess whether secondary RtoP entails the character of a *right*,<sup>246</sup> *permission*<sup>247</sup> or *responsibility*<sup>248</sup> to protect. However, debate centres on secondary RtoP's capacity to become

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<sup>242</sup> See especially, Bellamy and Reike (n 182), 89-94 [outlining the legal duties which primary RtoP interconnects with under international criminal, humanitarian and human rights law] and Scheffer, "Atrocity Crimes Framing the Responsibility to Protect" (n 217), 77-98 [outlining the interplay between the RtoP framework and the legal basis and development of international criminal law].

<sup>243</sup> For e.g. MacFarlane, Thielking and Weiss (n 185), 988.

<sup>244</sup> Several commentators allude to this view, see for e.g. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (n 3) 223-41; Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 180), 456; Welsh and Banda (n 53), 225; Breau (n 185), 440 and 464; Nasu (n 180), 219 and Payandeh (n 53), 469-516.

<sup>245</sup> See especially, Strauss, "A Bird in the Hand is Worth Two in the Bush" (n 53), 25-57; Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 11) and Shaffer and Pollack (n 185), 1232.

<sup>246</sup> For e.g. Peters, 'Humanity as the Alpha and Omega of Sovereignty' (n 53), 533-535; Slaughter, 'Security, Solidarity and Sovereignty' (n 200), 621; Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 180), 447-450; Brune and Toope (n 53), 76; A Orford, 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept' (2011) 3 GRtoP 400, 401 and R Mani and T Weiss, 'RtoP's Missing Link, Culture' (2011) 3 GRtoP 451, 457.

<sup>247</sup> Orford, *International Authority and the Responsibility to Protect* (n 53), 25.

<sup>248</sup> See especially, Orford, *ibid*, 25-27; Strauss, "A Bird in the Hand is Worth Two in the Bush" (n 53), 48; Payandeh (n 53), 482-484 and 508-513; Welsh and Banda (n 53), 216-220; Glanville, 'The Responsibility to Protect Beyond Borders' (n 53), 18-19 and 27-30; Peters, 'Humanity as the Alpha and Omega of Sovereignty' (n

a *duty*, specifically a duty of care,<sup>249</sup> duty to act,<sup>250</sup> an imperfect duty<sup>251</sup> or a provisional duty.<sup>252</sup> Notably, each of the aforementioned corresponds with *traditional* formulations of the character which rules/doctrines can entail. This raises the question of whether secondary RtoP's character may be reconciled more readily with more *novel* formulations, such as the notion of "responsibility" developed in a business and human rights context.

## 2.7 The Relationship between RtoP and the Field of Minority Protection

RtoP's relationship with minority protection receives less academic consideration than RtoP's interplay with other specific areas, such as refugee protection<sup>253</sup> and gender issues.<sup>254</sup> Present literature on this issue focuses on RtoP's impact on the role of Kin States in minority protection.<sup>255</sup> Two themes in this section of the literature merit particular consideration. The first is whether secondary RtoP allocates any *special responsibilities* to Kin States. In Kemp and Popovski's view,<sup>256</sup> the requirement for secondary RtoP to be discharged *collectively* means guards against this.<sup>257</sup> However, the present author considers that the possibility for Kin States to acquire special responsibilities under RtoP *indirectly* also merits examination. For example, is there scope for a Kin State exercising effective control in a secessionist enclave to become the bearer of primary RtoP, such as Russia in South Ossetia?

The second theme are the issues which can motivate Kin States to act against the State in which the minority group is located, including through using armed force without the prior authorisation of the UNSC.<sup>258</sup> Motivations for intervention discussed include discriminatory national citizenship policies<sup>259</sup> and territorial/resource disputes in the State in which the kin

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53), 540; A Bird, 'Third State Responsibility for Human Rights Violations' (2010) 21 (4) EJIL 883, 886-888; Brune and Toope (n 53), 74-77.

<sup>249</sup> Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 180).

<sup>250</sup> See particularly, Peters, 'Humanity as the Alpha and Omega of Sovereignty' (n 53), 539; Payandeh (n 53), 501 and Nasu (n 180), 216-234.

<sup>251</sup> Cunliffe (n 179), 55. See also Tan (n 180), 95; Welsh and Banda (n 53), 217-226 and Glanville, "The International Community's Responsibility to Protect" (n 180), 295-297.

<sup>252</sup> H M Roff, 'A Provisional Duty of Humanitarian Intervention' (2011) 3 (2) GRtoP 152-171.

<sup>253</sup> Cohen, 'Reconciling RtoP with IDP Protection' (n 181); The Editors, 'Special Issue for GRtoP: Protecting IDPs and Refugees' (n 181), 7 and Mooney (n 181).

<sup>254</sup> Charlesworth (n 181), 234; Bond and Sherret (n 181); Skjelsbaek (n 181); Stamnes (n 181); Davies and Teitt (n 181); Karlsrud and Solhjell (n 181) and Dharmapuri (n 181).

<sup>255</sup> Kemp, Popovski and Thakur (n 181) and Otsuki and Turner (n 181).

<sup>256</sup> Kemp, Popovski and Thakur, *ibid*, 236.

<sup>257</sup> Kemp, Popovski and Thakur, *ibid*.

<sup>258</sup> See J Castellino, "RtoP and Kinship in the Context of Syria and Lebanon" and H S Denduangrudee, "Problems and Prospects for RtoP: The Unilateral Action of Viet Nam in 1978" in Kemp, Popovski and Thakur, *ibid*, 122-143 and 144-167 respectively.

<sup>259</sup> E Defeis, "Minority Protection, Bilateral Mechanisms and the Responsibility to Protect" in Kemp, Popovski and Thakur, *ibid*, 77. See further, O Shapovalova, "The Role of Russia as a Kin-State in Protecting the Russian Minority in Ukraine" in Kemp, Popovski and Thakur, *ibid*, 168-187.

minority is located.<sup>260</sup> The present author considers that the extent to which RtoP addresses these factors warrants further reflection in the body of the thesis. For example, could the nexus between a failure to fulfil primary RtoP and secondary RtoP's activation encourage a minority to begin a territorial dispute with the State in order to compel the international community to intervene to protect them and, thereafter, recognise them as a "people" with a *remedial* right to self-determination?<sup>261</sup>

Schabas<sup>262</sup> also thoughtfully outlines the existing international protection framework to which RtoP relates, with particular emphasis on mechanisms which contribute to protecting minorities from heinous crimes like genocide. Reference is made to the important role which treaty monitoring bodies and the UN Human Rights Council [UNHRC] have in monitoring State compliance with their human rights obligations.<sup>263</sup> To the present author, the clear overlap between human rights violations and RtoP crimes raises a host of questions regarding the scope and nature of the UNHRC's role in RtoP cases which merit assessment in the main body of the thesis. For example, is there scope to suggest that the UNHRC may monitor State compliance with primary RtoP as a *separate* obligation? Is it possible that the UNHRC may not only consider individual human rights violations, but the perpetration of the mass atrocity crimes that RtoP covers? Can this be reconciled with its human rights mandate? What implications could arise from the UNHRC's role in RtoP cases?

Schabas<sup>264</sup> also highlights the particular bearing which RtoP has on minority protection, outlining the mixed history of the international community's management of the "minority problem" in practice preceding RtoP's adoption. Schabas refers to Rwanda to highlight that political will sometimes be absent when the time comes to take robust action to protect groups from RtoP crimes<sup>265</sup> and, perhaps most significantly, that the legal definitions of mass atrocity crimes may be used to stall responsive action.<sup>266</sup> This prompts examination of whether the legal elements of RtoP crimes have inhibited RtoP's discharge in a similar manner. In addition, Schabas discusses the way in which Kosovo testifies to the fact that, when international consensus on responding cannot be acquired, armed force may be used to

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<sup>260</sup> R Ako, "The Responsibility to Prevent Conflicts under RtoP: The Nigeria-Bassaki Situation" and J Tiburcio, "Brazilians in Paraguay: A Growing Internal Problem or a Regional Issue?" in Kemp, Popovski and Thakur, *ibid*, 208-228 and 188-207 respectively.

<sup>261</sup> A remedial right to self-determination refers to the argument that gross human rights violations can activate a right to self-determination in order to put an end to and/or prevent future violations. Whether or not such a right exists remains the subject of debate. However, it continues to be advocated by some states, including by Germany and Ireland in their written statements to the ICJ concerning the Court's Advisory Opinion with respect to the status of Kosovo. See <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1>> accessed 2 February 2011.

<sup>262</sup> Schabas (n 58).

<sup>263</sup> Schabas, *ibid*, 15-22.

<sup>264</sup> Schabas, *ibid*.

<sup>265</sup> Schabas, *ibid*, 12-14.

<sup>266</sup> Schabas, *ibid*, 12-13.



protect minorities on the basis of legitimacy, rather than legality.<sup>267</sup> This raises a host of questions for consideration in light of practice, including whether RtoP has overcome the need to resort to the use of legitimate, but illegal, armed force for human protection purposes when the UNSC fails to act effectively? Does RtoP add value to the wider concept of humanitarian intervention by, for example, contouring the point at which the use of armed force for human protection purposes becomes legitimate?

### 3 Methodology

The thesis explains and identifies to the reader (i) where consensus on RtoP's component parts presently lies; (ii) which aspects of RtoP are in the process of evolution or contestation; (iii) the policy, practical and legal considerations which underscore the scope and nature of RtoP's development between September 2005 and 2012; and (iv) the issues surrounding RtoP's components which require deeper reflection by relevant policymakers if RtoP is to be an effective contemporary protection framework. In order to clarify the way in which the thesis fulfils these objectives, it is necessary to explain the range of sources drawn upon, the role which minority protection has in the thesis and the substance of the following chapters.

#### 3.1 Classification and Handling of Sources

The thesis draws largely, but not entirely, on the way in which the main components, implications and potential value added of the RtoP framework have been approached *in practice since the Outcome Document's adoption*. Focusing on this period can help clarify where consensus, controversy and divergence on RtoP's components presently lie. Furthermore, focusing on this period can help address some misconceptions about RtoP which arise from continued discussion of the RtoP framework established in the 2001 ICISS Report.<sup>268</sup> This includes the "prevent, react, rebuild" continuum which was abandoned at the World Summit.<sup>269</sup> To do so, priority is given to sources which directly relate to, or may otherwise inform, the development, role and potential implications of each component of the RtoP framework in country-specific and more general practice to date.

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<sup>267</sup> Schabas, *ibid*, 14.

<sup>268</sup> For e.g. S Martin, 'Forced Migration, the Refugee Regime and the Responsibility to Protect' (2010) 2 GRtoP 38, 59; McClean (n 201); Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 180), 448; Mooney (n 181), 84 and Cohen, 'Reconciling RtoP with IDP Protection' (n 181), 26.

<sup>269</sup> See especially, Bellamy, *Responsibility to Protect: Global Effort to End Mass Atrocities* (n 13), 98-194 and Whitman (n 181), 157-160 [both reviewing RtoP as per the "prevent, react, rebuild" continuum].

### 3.1.1 State Views

At relevant junctures, consideration is given to over four hundred State views on the RtoP framework surveyed by the present author. The State views considered in the substantive chapters are those delivered (i) during the drafting of the Outcome Document; (ii) at the Outcome Document's adoption; (iii) at the 2009, 2010 and 2011 UNGA annual thematic debates on RtoP; (iv) UNSC debates on the protection of civilians in armed conflict; and (v) opening sessions of the UNGA.<sup>270</sup> The concluding chapter also refers to State views delivered at the September 2012 UNGA thematic debate on RtoP which have a particular bearing on the issues discussed in the substantive chapters.<sup>271</sup> The State views used in this thesis were not selected for specific reasons but, rather, are simply those available for assessment during the course of the research.

### 3.1.2 Case Studies

The fifteen country-specific situations in which RtoP has been invoked to date are used as "case studies". Three factors were used to determine what country-specific situations should be classified as "RtoP cases". First, RtoP must have been *explicitly referred to* in the specific situation at hand. Second, the reference to R2P must have been made by an actor who is in the position to (i) *encourage RtoP to be practically applied* (e.g. UNSG); or (ii) to *contribute to its practical application* (e.g. third States, regional organisations, UNSC and UNGA). Finally, the population must have sustained the harm at issue *after States accepted RtoP* at the World Summit.

Pursuant to these factors, the thesis considers the following case studies (i) Burma (2008);<sup>272</sup> (ii) Zimbabwe (2008);<sup>273</sup> (iii) the Israel-Gaza conflict (2008-2009);<sup>274</sup> (iv) the

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<sup>270</sup> The State views surveyed are detailed in Annex I (a)-(i).

<sup>271</sup> State views delivered at this debate are available at International Coalition on the Responsibility to Protect, 'Interactive Dialogue on Timely and Decisive Response' <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 17 October 2012.

<sup>272</sup> On the facts of this situation, see International Coalition for the Responsibility to Protect, 'The Crisis in Burma' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-burma>> accessed 12 August 2012 and D McClean and B Varner, 'Nations Press Myanmar for Entry as More Aid Arrives' (*Bloomberg*, Washington D.C., 13 May 2008) <<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aWBhdHdNOjfo&refer=home>> accessed 12 August 2012.

<sup>273</sup> For the facts of Zimbabwe see International Coalition of the Responsibility to Protect, 'The Crisis in Zimbabwe' <<http://responsibilitytoprotect.org/index.php/crises/crisis-in-zimbabwe>> accessed 10 August 2012. An interesting discussion of the internal situation is provided by Slim (n 201).

<sup>274</sup> For facts on the conflict, including allegations of RtoP crimes, see International Coalition on the Responsibility to Protect, 'The Crisis in Gaza: An RtoP Situation?' <<http://responsibilitytoprotect.org/index.php/crises/178-other-rtop-concerns/2750-the-crisis-in-gaza>> accessed 12 August 2012.

Russia-Georgia conflict (2008),<sup>275</sup> (v) Kenya (2008),<sup>276</sup> (vi) Darfur (2006 onward),<sup>277</sup> (vii) Democratic Republic of Congo (2008 violence),<sup>278</sup> (viii) Kyrgyzstan (2010),<sup>279</sup> (ix) Somalia (2008),<sup>280</sup> (x) Guinea (2010),<sup>281</sup> (xi) Côte d'Ivoire (2010),<sup>282</sup> (xii) South Sudan (2011),<sup>283</sup> (xiii) Libya (2011),<sup>284</sup> (xiv) Yemen (2011 onward),<sup>285</sup> and (xv) Syria (2011 onward).<sup>286</sup> As the extent and significance of RtoP's role in each case varies so too does the degree to which the case studies are invoked. Occasionally, reference is made to practice pre-dating RtoP's 2005 adoption, such as Kosovo<sup>287</sup> and Rwanda.<sup>288</sup> These references are made to highlight some of the possible implications or advantages of present approaches to RtoP.

Some of the case studies used in the thesis have received limited recognition as "RtoP cases" in present literature. For example, Bellamy<sup>289</sup> argues that Somalia is a case in which RtoP is 'missing in action',<sup>290</sup> because no State expressed 'their pleas in RtoP terms'.<sup>291</sup>

<sup>275</sup> For the facts of the conflict, see International Crisis Group, 'Russia vs. Georgia: The Fall Out' (2008), Europe Report No. 195 <[http://www.crisisgroup.org/~/.../195\\_russia\\_vs\\_georgia\\_the\\_fallout.pdf](http://www.crisisgroup.org/~/.../195_russia_vs_georgia_the_fallout.pdf)> accessed 12 November 2012 and Report of the Independent International Fact-Finding Mission on the conflict in Georgia, 'Volume I' (September 2009) <<http://www.ceiig.ch/Report.html>> accessed 12 November 2012.

<sup>276</sup> For details of this crisis, see On the establishment and powers of the Panel see particularly the African Union Peace and Security Council, 'Information Note on the Situation in Kenya and the Evolution of the Mediation Efforts' (14 March 2008) AU Doc PSC/PR/2(CXV) and African Union Peace and Security Council, 'Communique' (14 March 2008) AU Doc PSC/PR/Comm(CXV).

<sup>277</sup> For background of the situation see for e.g. D Mephram and A Ramsbotham, *Darfur: The Responsibility to Protect* (Institute for Public Policy Research, London 2006) and International Coalition of the Responsibility to Protect, 'Crisis in Darfur' <<http://responsibilitytoprotect.org/index.php/crises/crisis-in-darfur>> accessed 12 August 2012. This thesis is concerned with RtoP's role in relation to the situation following the Outcome Document's adoption. However, it should be noted that some States did refer to the RtoP framework laid down in earlier RtoP Reports in practice preceding 2005. See for e.g. Statements of the Representatives of the *United States, Algeria, Russian Federation* and *Chile* to the UNSC, UNSC Verbatim Record (30 July 2004) UN Doc S/PV.5015 and Statement of the Representative of *Algeria* to the UNSC, UNSC Verbatim Record (31 March 2005) UN Doc S/PV.5158.

<sup>278</sup> For background of the situation see e.g. International Coalition of the Responsibility to Protect, 'Crisis in the DRC' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-drc>> accessed 12 August 2012.

<sup>279</sup> See, J Claes, 'Preventing Conflict in the "Stans"' (23 April 2010) United States Institute of Peace: Peace Brief No. 21 <<http://www.usip.org/publications/preventing-conflict-in-the-stans>> accessed 20 October 2012.

<sup>280</sup> For a useful overview of the situation see Koko (n 180).

<sup>281</sup> For an overview of the facts of this case, see International Coalition of the Responsibility to Protect, 'Crisis in Guinea' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-guinea>> accessed 12 August 2012.

<sup>282</sup> For an overview of the situation, see International Coalition of the Responsibility to Protect, 'The Crisis in Côte d'Ivoire' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-ivory-coast>> accessed 12 August 2012.

<sup>283</sup> For an outline of the situation and the territorial claims therein, see International Coalition of the Responsibility to Protect, 'Crisis in Sudan' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-sudan>> accessed 12 August 2012.

<sup>284</sup> For a detailed overview of events in Libya, see International Coalition of the Responsibility to Protect, 'The Crisis in Libya' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya>> Last accessed 12 August 2012.

<sup>285</sup> UNSC Res 2014 (21 October 2011) UN Doc S/RES/2014. (UNSC Res 2014).

<sup>286</sup> For an overview of the situation see International Coalition of the Responsibility to Protect, 'Crisis in Syria' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria>> accessed 12 August 2012.

<sup>287</sup> The facts of Kosovo are comprehensively outlined in a body of literature. However, a useful source is T G Weiss, *Humanitarian Crises and the Responsibility to Protect* (n 2) 129-155. For a discussion of Kosovo as events unfolded, see the 1999-2000 op-eds reprinted in R Thakur, *The People vs. The State: Reflections on UN Authority, US Power and the Responsibility to Protect* (UN University Press, Tokyo 2011) 1-18.

<sup>288</sup> The following are some useful sources for the facts of the case: J Alvarez, 'Crimes of States/Crimes of Hate' (n 1) and Sarkin and Fowler (n 1).

<sup>289</sup> A Bellamy, *Global Politics and The Responsibility to Protect: From Words to Deeds* (New York: Routledge, 2011).

<sup>290</sup> Bellamy, *ibid*, 64.

However, examination of Security Council meeting records reveals that RtoP was explicitly referred to by Ghana<sup>292</sup> and the UN Special Representative of the Secretary-General for Somalia<sup>293</sup> and, therefore, that Somalia *can* be included in RtoP assessments.

In addition, the factors used to classify an RtoP case in this thesis differ from some of the approaches taken to this classification in present literature, not least the requirement that RtoP is explicitly cited by a relevant actor. Some commentators discuss RtoP's role in situations in which RtoP was not cited by any stakeholder, such as Nigeria,<sup>294</sup> North Korea<sup>295</sup> and Syria (pre-2011).<sup>296</sup> Arguably, this can lead to lessons about RtoP's scope and effectiveness being deduced from cases in which RtoP was not considered to be applicable, or not applied, by those in a position to discharge or influence its discharge in practice.

Finally, the timeframe of the case studies used in the thesis differs from that used by some commentators. In present literature, the situation in Darfur prior to the Outcome Document's 2005 adoption is often examined as an "RtoP case".<sup>297</sup> It is quite reasonable to discuss the way in which these cases underscored RtoP's formulation and, furthermore, to examine what they tell us about the steps that States and the broader international community should and should not take to ensure populations are protected from mass atrocity crimes. However, this writer considers that it is necessary to exercise sufficient caution when drawing lessons about RtoP from practice which either preceded its formulation or its adoption by States. At the very least, this approach can undermine the *evolving* nature of RtoP in both principle and practice.

### 3.1.3 Reports and Statements of Significant International, Regional and National Actors

Throughout, consideration is given to the relevant reports and statements of significant international, regional and national actors. The UNSG's Reports on the RtoP framework are

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<sup>291</sup> Bellamy, *ibid*, 66.

<sup>292</sup> Statement of the Representative of *Ghana* to the UNSC, UNSC Verbatim Record (17 December 2007) UN Doc S/PV.5805.

<sup>293</sup> Statement of *UN Special Representative of the Secretary-General for Somalia* to the UNSC, UNSC Verbatim Record (20 March 2008) UN Doc S/PV.5858.

<sup>294</sup> Nigeria is a good example. For examples of R2P being cited in relation to this situation, see generally International Coalition of the Responsibility to Protect, 'The Crisis in Nigeria' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-nigeria>> accessed 12 August 2011 and Ako (n 260), 208-228.

<sup>295</sup> K M Bondevik and K Abrams, "Democratic People's Republic of Korea" in Genser and Cotler (n 18), 346-374.

<sup>296</sup> Castellino (n 258), 122-143.

<sup>297</sup> The drawbacks of this are outlined in more detail in chapter four. The following are examples of commentators who consider aspects of RtoP in light of trends in Darfur: Bellamy, 'Responsibility to Protect or Trojan Horse?' (n 183); Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 11), 117 and Wheeler, 'A Victory for Common Humanity?' (n 183), 8.

a prime example. Since 2009 the UNSG has published an annual Report on RtoP.<sup>298</sup> Each Report deals with a different component of, or issue surrounding, the RtoP framework. These Reports merit particular reflection because they are released for consideration by the UNGA at an annual thematic debate on RtoP. However, as the Reports are merely recommendatory, their role in the thesis is generally limited to (i) highlighting the way in which actors like the UNSG perceive the Outcome Document's RtoP provisions; or (ii) identifying some of the issues arising in practice which relevant actors have failed to address fully.

#### 3.1.4 Minority Protection

Where appropriate, the field of minority protection is drawn upon to (i) assess where RtoP replicates and/or adds value to existing protective obligations/practice; and (ii) identify and explain the potential legal, policy and practical implications of present approaches to RtoP. In order to meet these objectives, the thesis uses a wide concept of a "minority". At relevant junctures consideration is given to the interplay between RtoP and (i) minority groups who are *in* a dominant position in the State (e.g. Alawite minority in Syria); (ii) nomadic minorities (e.g. Roma); (iii) territorially cohesive minorities whose aims are akin to those of a "people" with a right to self-determination (e.g. Russian citizens in the secessionist enclave of South Ossetia, Georgia); (iv) long-established minorities who are denied citizenship/nationality (e.g. Rohingya); and (v) minorities newly established in the State for varying reasons (e.g. migrant workers in Libya, refugees).

Several reasons underscore choosing minority protection as a tool for assessing RtoP. First, minority protection introduces an interesting dichotomy into the analysis of RtoP. Whilst minorities are 'genocide's most frequent targets',<sup>299</sup> the fact that the ruling Al-Assad regime in Syria belongs to the Alawite minority, illustrates that minorities can also perpetrate RtoP crimes. This dichotomy means that RtoP's relationship with minority protection can be complex, requiring policymakers to consider a range of deeper issues. For example, is it possible that secondary RtoP's discharge against a government perpetrating RtoP crimes

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<sup>298</sup> Report of the UNSG, Implementing RtoP (n 32); Report of the UNSG, 'Early Warning, Assessment and the Responsibility to Protect' (14 July 2010) UN Doc A/64/864; Report of the UNSG, 'The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect' (2011) UN Doc A/59/744 and Report of the UNSG, 'Responsibility to Protect: Timely and Decisive Response' (25 July 2012) UN Doc A/66/874-S/2012/578.

<sup>299</sup> K. Annan's April 2004 speech commemorating the tenth anniversary of the Rwandan genocide, cited in United Nations Commission on Human Rights, 'Specific Groups and Individuals: Minorities, Report of the Independent Expert on Minority Issues' (6 January 2006) UN Doc E/CN.4/2006/74, 18.

may indirectly facilitate ‘reverse ethnic cleansing’<sup>300</sup> in the territory against minorities which supported, or were considered to support, the regime?

Second, few would disagree with the view that minority protection and RtoP feature highly among those areas of international relations which trigger deep-seated apprehensions over the interplay between protection, sovereignty and territorial integrity. The *established* field of minority protection can therefore be usefully drawn upon in order to assess whether similar policy tensions could arise in relation to the relatively newly established RtoP framework. It is useful to briefly outline the two policy tensions which are given particular consideration in the substantive chapters and, furthermore, the kind of ways in which these issues will be utilised in the assessment of RtoP.

First, it should be noted that, with the exception of the right of minorities to existence, specific minority rights are predominately conferred on individual members of the minority group.<sup>301</sup> This is because some States were concerned that devising rights which are conferred on, and enforced by, distinct groups makes the individual members of the group depend on the group for protection, rather than the State (so-called ‘centrifugal tendencies’<sup>302</sup>). The fear is that this strengthens individual member’s loyalty to the group and could create a “slippery slope” from the group claiming (i) a right to create autonomous territorial arrangements which reflect its ethnic, religious, racial, linguistic or national identity within the State; to (ii) a right to secede from the State.<sup>303</sup> This reservation also underscores why (i) minority groups are not recognised as a “people” with a distinct right to self-determination; (ii) the creation of autonomous arrangements within a State has not been conferred as a *right* of minorities but merely as a best practice;<sup>304</sup> and (iii) minority rights instruments often explicitly require the rights to be enforced with full respect to States’ sovereignty and territorial integrity.<sup>305</sup> The second policy issue relates to “Kin States”.<sup>306</sup>

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<sup>300</sup> ICISS Report (n 8), 40. For a discussion of reverse ethnic cleansing in the field of minority protection more generally, see particularly W Kymlicka, ‘The Internationalisation of Minority Rights’ (2008) 6 (1) ICON 1, 24.

<sup>301</sup> That is, for the benefit of ‘persons belonging to minorities’. See particularly, Article 27 of the ICCPR and UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) UN Doc A/RES/47/135 arts 2-5. (1992 UN Declaration on the Rights of Persons Belonging to National, Ethnic, Linguistic or Religious Minorities).

<sup>302</sup> As Quane explains ‘[t]he fact that the individual is dependent on the group for the exercise and enforcement of these rights can have significant implications. It can reinforce the sense of the allegiance to the group which can, in turn, heighten inter-communal differences and impede the development of a sense of common citizenship. It can also encourage members to look to the group to protect their interests rather than to the State’. H Quane, ‘Rights in Conflict? The Rationale and Implications of Using Human Rights in Conflict Prevention Strategies’ (2007) 47 VA. J. Int’l L. 463, 499.

<sup>303</sup> On this see e.g. Kymlicka (n 299) and P Thornberry, ‘Self-Determination, Minorities, Human Rights: A Review of International Instruments’ (1989) 38 (4) I.C.L.Q. 867, 874.

<sup>304</sup> Commission on Security and Cooperation in Europe, ‘Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE’ (adopted 29 June 1990) para 35 <<http://www.osce.org/odihr/elections/14304>> accessed 12 November 2012.

<sup>305</sup> For e.g. Article 8 (4) of the 1992 UN Declaration on the Rights of Persons Belonging to National, Ethnic, Linguistic or Religious Minorities (n 300) provides that ‘[n]othing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States’.

<sup>306</sup> That is, a State which has a bond with a minority group residing in another State’s territory.

Throughout history, Kin States relationship with a minority group residing in another State has created tensions between the two States.<sup>307</sup> To regulate the Kin State's role in minority protection, relevant mechanisms provided that Kin States should only confer benefits upon minorities with the *explicit consent* of the State in which the minority was located.<sup>308</sup> These instruments also clarified what benefits Kin States cannot confer, excluding actions like providing financial assistance to those seeking political or territorial change on behalf of a minority group in the territory of another State.<sup>309</sup>

At appropriate intervals, the thesis considers whether the respective components of RtoP may alleviate or compound the aforementioned policy tension. Could present approaches to the primary RtoP bearer add legitimacy to secessionist movements, thereby creating reservations over the potential for RtoP to strengthen the slippery slope from claims to autonomy to secession? Could trends regarding RtoP's beneficiary concept potentially encourage secessionist tendencies? Do approaches toward primary RtoP entail the potential to exacerbate concerns over the relationship between group rights and 'centrifugal tendencies'?<sup>310</sup> Are commentators correct to consider that the RtoP framework does not, as it presently stands, empower the Kin State to act inappropriately?<sup>311</sup> Or, alternatively, are there signs in practice which suggest that the Kin State may actually have a significant role in the RtoP framework? For example, is it possible that at least some Kin States may acquire a particular role in discharging primary RtoP because of outstanding ambiguities with respect to the primary RtoP bearer concept? Could existing proposals on RtoP's early warning system encourage, albeit indirectly, the Kin State to increase its interference in the internal affairs of the third State in which the kin minority group is located? The policy tensions underscoring minority protection are also utilised to suggest possible explanations for why certain trends and concerns may have emerged in RtoP practice to date, thereby helping to develop a deeper understanding of the legal, policy and practical issues which underscore where present consensus and debate on RtoP lies. For example, could the issues surrounding autonomous arrangements underscore why States' did not affirm the 2001 ICISS Report rebuilding responsibility at the 2005 World Summit?

Finally, the clear overlaps between minority protection and RtoP make the former a logical tool for assessing the extent of RtoP's relationship with the existing international legal and political protection framework. Does the primary RtoP bearer concept replicate the

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<sup>307</sup> For practical examples, see generally Kemp, Popovski and Thakur (n 181), especially 77.

<sup>308</sup> See generally, OSCE High Commissioner for National Minorities, *The Bolzano/Bozen Recommendations on National Minorities and Inter-State Relations and Explanatory Note* (OSCE HCNM, The Hague 2008) (OSCE HCNM, *The Bolzano/Bozen Recommendations*) and Commission, 'Report of the Preferential Treatment of National Minorities by their Kin State' (2001) Doc. CDL/INF <[http://www.venice.coe.int/docs/2001/CDL-INF\(2011\)019-e.pdf](http://www.venice.coe.int/docs/2001/CDL-INF(2011)019-e.pdf)> accessed 18 June 2012.

<sup>309</sup> OSCE HCNM, *The Bolzano/Bozen Recommendations*, *ibid*, 7, and Venice Commission, *ibid*, 21-23.

<sup>310</sup> Quane (n 301), 499.

<sup>311</sup> Kemp, Popovski and Thakur (n 181), 236.

State as the duty bearer of existing human rights, including minority rights? Do present approaches to the concept develop upon those in a minority protection context, such as the link between State legitimacy, protection and external recognition inherent in the European Union's criteria for recognising territories emerging from the former Soviet bloc as "States"?<sup>312</sup> Do approaches to secondary RtoP's activation add clarity to when the international community should act to protect minorities by identifying the specific point at which a State's protective duties cease being 'exclusive'<sup>313</sup> and the international community should take protective action?

In some cases, assessing RtoP from the perspective of minority protection will be relevant to RtoP's specific role in cases involving minorities, such as (i) RtoP's capacity to strengthen/counter existing reservations regarding Kin States; and (ii) whether new minorities like migrant workers and refugees are encompassed within present understandings of RtoP's beneficiary concept. At other times, the assessment will be relevant to RtoP's application more generally. For example, considering the extent to which primary RtoP echoes the character of States human rights duties, including those relating to specific minority rights, is relevant to the scope of primary RtoP's discharge in all contexts.

### 3.2 Thesis Structure

Each of the five substantive chapters of the thesis explores a particular component of RtoP, specifically (i) RtoP's bearer and beneficiary concepts; (ii) the scope, character, duration and enforcement of primary RtoP; (iii) the nature and character of secondary RtoP's activation; (iv) the scope of secondary RtoP's early warning, assistance, peaceful and non-peaceful components; and (v) the legal status and character of primary and secondary RtoP. International lawyers will recognise that each of these components is fundamental to the formulation of any viable political or legal mechanism, including RtoP.

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<sup>312</sup> European Community, 'Declaration on the Recognition of New States of New States in Eastern Europe and in the Soviet Union' (16 December 1991) reprinted in R Caplan, *Europe and the Recognition of New States in Yugoslavia* (CUP, Cambridge 2005) Appendix I, 187-188.

<sup>313</sup> Commission on Security and Cooperation in Europe, 'Report of the CSCE Meeting of Experts on National Minorities in Geneva' (1991), Section 3, para 3 <[www.osce.org/hcnm/14588](http://www.osce.org/hcnm/14588)> accessed 12 October 2012 and OSCE HCNM, *The Bolzano/Bozen Recommendations* (n 307), 11-12.



### 3.2.1 Chapter Two: The Concept of the Bearer and Beneficiary – A Responsibility to Protect or Preclude?

Chapter two examines the potential significance and implications of trends in State views and relevant practice regarding RtoP's bearer and beneficiary concepts. In terms of the primary RtoP bearer, the chapter explores whether the Outcome Document refers to 'State'<sup>314</sup> in its legal sense and, if so, is it only territories which meet the criteria of statehood that can bear primary RtoP? Drawing upon relevant trends in the Russia-Georgia and Israel-Gaza conflicts, the chapter considers who would bear primary RtoP in territories which do not meet the statehood criteria, such as secessionist enclaves and Occupied Territories. Consideration is also given to the Outcome Document's reference to 'national authorities'. Does this term refer to the government of the State? If so, who bears primary RtoP in States where (i) national election results are awaiting verification (e.g. Kenya and Zimbabwe); (ii) the internationally recognised government cannot take power because the then existing government will not concede leadership (e.g. Côte d'Ivoire); or (iii) the existing government faces an armed insurrection because it perpetrates RtoP crimes against its population (e.g. Libya and Syria)?

Chapter two explores whether practice supports the view that the Outcome Document's reference to the 'international community'<sup>315</sup> is intended to denote the *bearer* of secondary RtoP. Reference is made to whether the "international community" concept may instead overlap with its usage in the contexts of State responsibility and minority protection, specifically as shorthand for the range of actors who have a vested interest in protecting populations from RtoP crimes. In what circumstances, do the respective interests of relevant actors arise? Does an "actors" approach help to make secondary RtoP's discharge more flexible?

Chapter two outlines that continued affirmations<sup>316</sup> of the "populations" beneficiary concept may be inconsistent with trends which have emerged in practice since the Outcome Document's adoption and the potential implications thereof. The present author considers the potentially significant reasons for why a "populations" beneficiary concept is used in the Outcome Document, thereby raising questions over the suitability of still referring to the beneficiary concepts of earlier Reports, such as "citizens".<sup>317</sup> The chapter suggests that caution should perhaps be taken when outlining RtoP's role in relation to specific sections of

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<sup>314</sup> Outcome Document (n 15), para 138.

<sup>315</sup> Outcome Document, *ibid*, paras 138-139.

<sup>316</sup> As per, for e.g. Pace and Deller (n 181), 26; Wheeler, *Operationalising the Responsibility to Protect* (n 181), 16; Peters, 'Humanity as the Alpha and Omega of Sovereignty' (n 53), 522 and Wheeler and Egerton (n 181), 123.

<sup>317</sup> As per, for e.g. Amneus (n 183), 14; Slaughter, 'Security, Solidarity and Sovereignty' (n 200), 620; Thakur, 'Behind the Headlines' (n 189), 7 and Charlesworth (n 181), 234.

populations, such as refugees,<sup>318</sup> not least because these groups may fall outside the way in which some States appear to understand RtoP's beneficiary concept (e.g. citizens of the State only).

### 3.2.2 Chapter Three: Primary RtoP – Old Policies New Package?

Chapter three systematically analyses primary RtoP's scope, character, duration, value added and methods for monitoring State compliance therewith. In so doing, the chapter illustrates that a volume of practice now exists in relation to primary RtoP as a significant component of RtoP in its own right.

The chapter considers whether practice to date suggests that primary RtoP may add value to, not simply affirm,<sup>319</sup> the existing criminal, human rights and humanitarian law obligations of States to which it relates. For example, the chapter explores whether primary RtoP may add value by (i) clarifying the requirements of States aforementioned existing obligations in a specific RtoP context and, therefore, have a similar utility to treaties which clarify what the particular requirements of general treaties are in a specific context (e.g. the Convention on the Elimination of Discrimination Against Women); and (ii) by entailing the capacity to develop new rights/obligations, such as a collective right of populations to protection from RtoP crimes.

Drawing upon the approaches adopted to primary RtoP's duration in practice to date, chapter three challenges the view that the RtoP framework entails a 'complementarity trap'.<sup>320</sup> It argues that both the State and the international community can, in certain contexts, be *concurrently* responsible for protecting populations' from RtoP crimes. Accordingly, chapter three outlines that the relationship between primary and secondary RtoP is not necessarily an issue of the State's responsibility shifting to the international community but, instead, the point at which the latter comes into practical effect.

Finally, chapter three assesses the advantages and disadvantages of recommendations regarding routes through which to monitor States' compliance with primary RtoP. The present author surveys the capacity for compliance with primary RtoP to be monitored through (i) wider bodies, such as the UNHRC; and/or (ii) specific RtoP actors, such as the

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<sup>318</sup> Cohen, 'Reconciling RtoP with IDP Protection' (n 181); The Editors, 'Special Issue for GRtoP: Protecting IDPs and Refugees' (n 181), 7; Mooney (n 181); Otsuki and Turner (n 181); Kemp, Popovski and Thakur (n 181); Charlesworth (n 181), 234; Bond and Sherret (n 181); Skjelsbaek (n 181); Stamnes (n 181); Davies and Teitt (n 181); Karlsrud and Solhjell (n 181) and Dharmapuri (n 181).

<sup>319</sup> Hehir, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention* (n 3) 74; Strauss, "A Bird in the Hand is Worth Two in the Bush" (n 53), 48-51; Bellamy and Reike (n 182), 89-94; Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 11), 118 and Gierczyk (n 182), 101-118.

<sup>320</sup> Stahn, *ibid*, 116.

newly appointed national RtoP advisers. By drawing upon relevant practice, chapter three identifies the potential policy and practical impediments to present recommendations, not least the possibility that utilising the UNHRC for monitoring compliance with primary RtoP could further politicise the body.

### 3.2.3 Chapter Four: The Activation of Secondary RtoP – A Uniform Standard or Sliding Scale?

Chapter four examines what the approaches taken to secondary RtoP in country-specific practice to date suggest about the nature, character and scope of secondary RtoP's activation. Part one of the chapter considers the substantive aspects of secondary RtoP's activation. The present author outlines that the international community have typically discharged secondary RtoP's assistance, peaceful and non-peaceful components when the population has sustained *some RtoP-type* harm and, therefore, that secondary RtoP's seems to be activated when RtoP crimes appear *imminent*. The chapter considers whether this threshold adds value to existing mechanisms by, for example, avoiding the ambiguity which surround when the wider concept of humanitarian intervention could and should be discharged? To what extent, if any, does an imminence threshold enable the international community to apply secondary RtoP for preventive purposes? Do the factors taken into account when assessing secondary RtoP's activation have the capacity to compound or overcome difficulties in practice preceding its formulation, not least waiting on the legal elements of genocide to be established as occurred in Rwanda?

The present author examines whether practice to date sustains present conceptions of the bearing which the legal elements of RtoP crimes have on decisions over secondary RtoP's activation. Does practice sustain Wong's<sup>321</sup> view that secondary RtoP's activation is dependent on the harm sustained by a population being perpetrated with the requisite mens rea of the RtoP crime apprehended? For example, is there a requirement that the international community consider that murder which amounts to a 'widespread and systematic attack against a civilian population' was undertaken with the requisite intent to kill and knowledge of the attack? Is there scope to argue that, in practice, decision makers may consider broader legal issues, such as whether the harm is being sustained by the protected person of an RtoP crime (e.g. a national, ethnical, racial or religious group<sup>322</sup>)? Is it appropriate to draw

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<sup>321</sup> Wong (n 216), 252-256.

<sup>322</sup> Rome Statute (n 51) art 6, emphasis added.

comparisons between secondary RtoP's activation and the substantiality test used in international criminal law?<sup>323</sup>

In terms of the character of secondary RtoP's activation, the chapter considers whether the Outcome Document<sup>324</sup> criteria of manifest failure and inadequacy of peaceful means represent an overarching threshold for the activation of peaceful and non-peaceful secondary RtoP measures. Drawing upon trends in practice to date, the chapter explores whether secondary RtoP's activation may be more appropriately explained as that which occurs on the basis of a sliding scale. To this effect, the present author suggests that there may actually be different tipping points for assistance, peaceful and non-peaceful secondary RtoP measures and, furthermore, that important policy considerations may underscore this approach.

The second part of chapter four assesses the *institutional* aspects of secondary RtoP's activation process. Outlining the substance and scope of decision making on secondary RtoP's activation in the UNSC, the present author considers whether the Outcome Document's 'case-by-case basis'<sup>325</sup> provision may enable the UNSC to take into account a whole host of factors which the Outcome Document does not refer to when deciding whether secondary RtoP has been activated in particular cases. The way in which the criminal basis of RtoP encourages political bodies to draw increasingly upon international law is critically examined. Does this approach blur the distinction between political and judicial bodies? The role of the UNHRC in secondary RtoP's activation is discussed in light of practice to date. Is it possible that the UNHRC's role in monitoring State compliance with human rights may extend into monitoring compliance with primary RtoP, examining whether mass atrocity crimes are emerging and not merely relevant patterns of human rights violations? Can assessing the emergence of RtoP crimes be reconciled with the UNHRC's human rights mandate in all cases?

#### 3.2.4 Chapter Five: The Scope of Secondary RtoP – Status Novus vs. Status Quo?

Chapter five examines the scope, value and potential implications of each of the main ways through which secondary RtoP can be upheld or practically applied, namely (i) early warning and assessment of RtoP crimes; (ii) assistance and capacity building; (iii) peaceful means; and (iv) non-peaceful means. In so doing, chapter five raises a range of significant questions

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<sup>323</sup> Rosenberg and Strauss (n 50), 58-62 and Scheffer, "Atrocity Crimes Framing the Responsibility to Protect" (n 217), 83-84.

<sup>324</sup> Outcome Document (n 15), para 139.

<sup>325</sup> Outcome Document, *ibid*.

which require careful consideration by policymakers if RtoP is to be a viable protection mechanism.

Part one examines RtoP's early warning and assessment system. Could present formulations of this system encourage, albeit indirectly, Kin States to increase their level of interference in the internal affairs of the State in which the kin minority is located? Does practice sustain the view<sup>326</sup> that early indicators that RtoP crimes may be perpetrated could be overlooked because of developed States preoccupation with national security issues like terrorism?

Part two evaluates secondary RtoP's assistance component at length, exploring whether assistance is provided through structural and/or operational prevention measures and the ways in which consent to the provision of assistance can be acquired. Particular attention is given to whether recent practice, such as the case studies of Libya and Syria, cast doubt over the general presumption that assistance will be given to the State's national authorities.<sup>327</sup> Does recent practice suggest that the recipient of assistance can be more complex and that which has a direct bearing on wider issues, such as the relationship between secondary RtoP and the principle of neutrality in civil wars?

Part three considers secondary RtoP's responsive component. Is the meaning of "peaceful" responsive measures settled among States? What factors are taken into account when determining whether or not to authorise the use of armed force to protect a population from RtoP crimes? Does practice suggest that there may be growing support among the permanent five members of the UNSC to refrain from wielding the veto in cases involving RtoP crimes? Do trends in recent practice open up possible avenues to coerce or induce UNSC authorisation for the application of non-peaceful means?

### 3.2.5 Chapter Six: The Legal Status and Character of Primary and Secondary RtoP – Another Case of Legitimacy vs. Legality?

Chapter six comprehensively assesses what trends in practice between 2005 and 2012 inform us with respect to the evolution of primary and secondary RtoP's legal status and character. In doing so, the present author critically examines whether current understandings of RtoP's legal status and character stand up against practice.

Chapter six considers the legal status of primary and secondary RtoP separately, proposing that primary and secondary RtoP's legal development between 2005 and 2012 can

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<sup>326</sup> MacFarlane, Thielking and Weiss (n 185), 981; N Grono, 'Briefing - Darfur: The International Community's Failure to Protect' (2006) 105 (421) African Affairs 621, 628 and J E Alvarez, 'The Schizophrenias of RtoP' (Panel presentation at the 'Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference', The Hague, 30 June 2007).

<sup>327</sup> For examples see, Charlesworth (n 181), 235 and A Bellamy and P D Williams, 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect' (2011) 87 (4) Int. Affairs 825, 827.

be divided into three distinct phases. In terms of primary RtoP, the present author utilises trends in practice to challenge the view that primary RtoP's legal status can be summated effectively by referring to its interplay with States existing human rights, humanitarian and criminal law obligations.<sup>328</sup> To this effect, chapter six argues that primary RtoP encourages new interpretations of States existing human rights, humanitarian and criminal law treaty obligations by promoting new consequences for their breach, namely the application of secondary RtoP by the international community.

Chapter six explores the way in which secondary RtoP's legal status has been approached in practice between 2005 and 2012, including in over four hundred State views. Does practice suggest that secondary RtoP's may be legally significant by creating new interpretations of the existing treaty provisions to which it relates?<sup>329</sup> Does national, regional and international practice add weight to, or undermine, the view that secondary RtoP creates no new legal changes to the existing regime on the use of armed force?<sup>330</sup>

The chapter assesses the extent to which, if at all, relevant practice upholds perceiving primary RtoP as a "duty".<sup>331</sup> It questions whether commentators may be encountering difficulty in fully reconciling the character of secondary RtoP with a duty, right, permission or responsibility to protect because this rests on a presumption that secondary RtoP can only be characterised in a *traditional* sense. The present author outlines the view that secondary RtoP may perhaps be reconciled more effectively with the novel notion of "responsibility" developed in the business and human rights context

### 3.2.6 Chapter Seven: The Scope, Viability and Value Added of RtoP – Research Results and Recommendations

The concluding chapter draws upon the findings made in the substantive chapters and as part of the research to outline what practice between 2005 and 2012 tells us about the scope, viability and value added of the RtoP framework which stands today. Is the UNSG correct to summate the scope of RtoP as 'narrow but deep'? In what ways does RtoP represent value added to the existing obligations/practice to which it relates? Have developments been 2005

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<sup>328</sup> Bellamy and Reike (n 182), 89-94 and Scheffer, "Atrocity Crimes Framing the Responsibility to Protect" (n 217), 77-98.

<sup>329</sup> Payandeh (n 53), 491-92 [arguing that secondary RtoP may be used as a "dynamic interpretation" of UN Charter obligations].

<sup>330</sup> The following are good examples of this position: Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (n 3), 223-41; Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 180), 456; Feinstein (n 182), 46 and 48; Welsh and Banda (n 53), 225; Breau (n 185), 440 and 464; Nasu (n 180), 219; McClean (n 201), 129; McCarthur (n 231), 431-33; Wheeler and Egerton (n 181), 128-29; Bruneau and Toope (n 53), 71-79 and Sarkin, 'Is the Responsibility to Protect an Accepted Norm of International Law in the Post-Libya Era?' (n 184), 26-28.

<sup>331</sup> See particularly, Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 11), 118-119.

and 2012 succeeded in making RtoP politically palatable to States? Is there a risk that focusing on RtoP's political appeal to States could undermine its capacity to protect populations effectively?

A range of proposals are made with respect to RtoP's future development, including the way in which the annual UNSG Reports on RtoP and UNGA thematic debates could be maximised so as to begin deeper consideration of those elements of RtoP which remain unsettled. Is it possible to maintain an overarching beneficiary concept like "populations"? Is there a need for further reflection on who bears primary RtoP in territories which do not meet the criteria for statehood? Should policymakers give more detailed consideration to the issue of to whom assistance is provided in cases where the State's national authorities are perpetrating RtoP crimes? Can regime change be anything but an acceptable outcome of secondary RtoP's discharge in such cases?

The thesis concludes that RtoP has been substantially developed since its acceptance by States at the 2005 World Summit. Notwithstanding this, recent practice in cases like Libya and Syria raise significant questions about whether the RtoP which stands today can protect populations effectively in all cases. Is there scope to suggest that the immediate focus of policymakers may be less "RtoP" and more "PtR" – "Protect the Responsibility"?

## CHAPTER II

### THE CONCEPT OF THE BEARER AND BENEFICIARY

#### A RESPONSIBILITY TO PROTECT OR PRECLUDE?

### Introduction

Throughout RtoP's development,<sup>332</sup> "States"<sup>333</sup> have been identified as the primary RtoP bearer. This bearer concept was accepted by States at the World Summit, the Outcome Document providing that '[e]ach individual State'<sup>334</sup> has 'the responsibility to protect its populations'<sup>335</sup> and, furthermore, that 'national authorities'<sup>336</sup> are mandated to comply with primary RtoP. Additionally, the Outcome Document provides that it is the 'international community'<sup>337</sup> which should provide assistance and use peaceful and/or non-peaceful responsive measures<sup>338</sup> in order to discharge secondary RtoP. With regard to who is to benefit from primary and secondary RtoP's discharge, the Outcome Document is clear, detailing 'populations'<sup>339</sup> as the beneficiaries of all elements of RtoP.

This chapter examines the scope, nature and character of RtoP's aforementioned bearer and beneficiary concepts. Particular emphasis is placed upon whether the bearer and beneficiary concepts established at the World Summit have been upheld in subsequent practice. To do so, this writer has examined the approaches taken to RtoP's bearer and beneficiary concepts within the range of cases in which RtoP has been cited to date and, furthermore, two hundred and fifty seven State views<sup>340</sup> on RtoP which were delivered in the course of (i) the drafting of the Outcome Document and at its adoption;<sup>341</sup> (ii) an extensive range of the UN Security Council [UNSC] debates on the Protection of Civilians in Armed Conflict;<sup>342</sup> and (iii) the 2009 UN General Assembly [UNGA] thematic debate on RtoP's

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<sup>332</sup> That is, within the Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, Ottawa 2001) (ICISS Report); Report of the High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2004) UN Doc A/59/562 (HLP Report); Report of the UN Secretary General, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (2005) UN Doc A/59/2005 (UNSG Report, 'In Larger Freedom') and Report of the UN Secretary General, 'Implementing the Responsibility to Protect' (12 January 2009) UN Doc. A/63/677 (UNSG Report 2009, Implementing RtoP').

<sup>333</sup> See accordingly ICISS Report, *ibid*, 13 and 17; HLP Report, *ibid*, 1,9,31,61,65; UNSG Report, 'In Larger Freedom', *ibid*, 35; UNSG Report 2009, Implementing RtoP, *ibid*, 7-8.

<sup>334</sup> UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 138. (Outcome Document).

<sup>335</sup> Outcome Document, *ibid*.

<sup>336</sup> Outcome Document, *ibid*, para 139.

<sup>337</sup> Outcome Document, *ibid*, paras 138-139.

<sup>338</sup> Outcome Document, *ibid*, para 139.

<sup>339</sup> Outcome Document, *ibid*, paras 138-139.

<sup>340</sup> State views surveyed for this chapter are detailed in Annex I (a), (b), (c), (d), (e), (f), (g) (i) and (i).

<sup>341</sup> Surveyed State views are detailed in Annex I (a)-(e).

<sup>342</sup> Surveyed State views are detailed in Annex I (i).



implementation.<sup>343</sup>

Part one focuses upon RtoP's "bearer" concepts. The primary RtoP bearer is discussed first and a range of questions are asked. For example, should the Outcome Document's reference to "State" be interpreted in its legal sense i.e. in accordance with the generally recognised criteria for statehood?<sup>344</sup> If so, who is responsible for discharging primary RtoP in territories which do not meet these criteria, such as secessionist enclaves and Occupied Territories? To explore these issues, the chapter examines the way in which the primary RtoP bearer concept was approached in the Israel-Gaza conflict (2008-2009) and Russia-Georgia conflict (2008).

The Outcome Document's reference to "national authorities" is then examined. Does the international community's recognition of a State's "national authorities" in practice to date overlap with the approaches taken to government recognition? If so, has RtoP practice upheld the traditional approach taken to government recognition, recognising States' "national authorities" as those who are in *effective control* of the territory? Alternatively, are there signs in practice which suggest that the recognition of "national authorities", including the government of a State, may vary in cases involving RtoP crimes? To address these questions, this writer considers who was recognised as the "national authorities" of the State in cases where (i) national election results require verification (e.g. Kenya and Zimbabwe); (ii) the internationally recognised government cannot exercise power because the then existing government will not concede power (e.g. Côte d'Ivoire); and (iii) the government faces an armed insurrection due to its perpetration of RtoP crimes (e.g. Libya and Syria).

The chapter then discusses the Outcome Document's reference to the "international community" as the entity which should discharge secondary RtoP. The chapter explores whether this concept delineates the entity which bears secondary RtoP or, rather, is shorthand for the range of actors who can discharge secondary RtoP. The present author considers which factors determine whether a particular actor will have a role in a particular RtoP case and the merits and demerits of this.

Part two of the chapter focuses on RtoP's *beneficiary concept*.<sup>345</sup> Consideration is given to the doctrinal, legal and policy significance of trends regarding the beneficiary concept which have emerged in State views on RtoP. This includes the broader significance of using

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<sup>343</sup> Surveyed State views are detailed in Annex I (g) (i).

<sup>344</sup> It is commonly accepted that the criteria for statehood are reflected in Montevideo Convention on the Rights and Duties of States (1933) (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 art 1 (Montevideo Convention). The Article requires that a "State" have (i) a permanent population; (ii) defined territory; (iii) government; and (iv) the capacity to enter into relations with other States.

<sup>345</sup> A version of this chapter's discussion of RtoP's beneficiary concept was presented at the European Science Foundation, 'The Responsibility to Protect: From Principle to Practice' conference, held in Linköping, Sweden from 8-12th June 2010. A version was subsequently published. See J D Halbert, "A Responsibility to Protect or Preclude? Examining the Beneficiaries of the Responsibility to Protect" in A Nollkaemper and J Hoffmann (eds), *The Responsibility to Protect: From Principle to Practice* (Amsterdam University Press, Amsterdam 2012) 273-289.

an all-inclusive beneficiary concept like “populations”. For example, does this concept mean that all persons are RtoP beneficiaries by reason of their basic status as human beings? If so, does this mean that the international community should extend equivalent protection to those perpetrating RtoP crimes and the civilians sustaining harm therefrom when discharging secondary RtoP? The latter section examines the significance of the three differing approaches taken to the beneficiary concept in international practice to date. Do the varying approaches have a bearing upon the capacity to maintain a beneficiary concept like “populations” which spans the RtoP framework?

Throughout, the chapter evaluates the potential added value and implications of approaches to RtoP’s bearer and beneficiary concepts, with particular attention given to the field of minority protection. Could the approaches which have been adopted to the primary RtoP bearer in certain contexts assist a Kin State to consolidate its control and influence in part of the territory of another sovereign State in which a minority group is located? Could some of the trends regarding RtoP beneficiaries in State views exclude certain persons belonging to minorities because, for example, they lack the citizenship of the State in which they reside? Could they encourage secessionist tendencies on behalf of a minority group by impacting upon current understandings of the scope and nature of the right to self-determination?

## **1 The Primary RtoP Bearer Concept**

### **1.1 “State”**

Neither an examination of the drafting history of the Outcome Document nor State views assist in determining whether the Outcome Document’s reference to “State” is used in its legal sense. Notwithstanding this, certain elements of the Outcome Document and wider international law can be usefully drawn upon to establish in which sense the term “State” is used.

First, the Outcome Document’s overall wording tends to suggest that “State” is used in its legal sense because several of the generally accepted criteria for statehood are used throughout, albeit implicitly. There is a clear reference to “populations”<sup>346</sup> which, supplemented with the term ‘its’,<sup>347</sup> tends to overlap with the requirement for a “State” to have a ‘permanent population’.<sup>348</sup> The criterion of “government” is implicit to the reference

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<sup>346</sup> Outcome Document (n 333), para 138.

<sup>347</sup> Outcome Document, *ibid*.

<sup>348</sup> Montevideo Convention (n 343), art 1.

to “national authorities”.<sup>349</sup> Furthermore, the reference to ‘[e]ach individual State’<sup>350</sup> tends to connect the primary RtoP bearer with the requirement for a State to have a ‘defined territory’.<sup>351</sup> Finally, the provision that the objective of the international community’s provision of assistance is to ‘help’<sup>352</sup> and ‘encourage’<sup>353</sup> the “State” to ‘build capacity’<sup>354</sup> to fulfil primary RtoP is redolent of the requirement that “States” possess the capacity to enter into international relations.<sup>355</sup> In addition, it is notable that relevant international instruments have sometimes explicitly explained that the term “State” is *not* being used in its legal sense.<sup>356</sup> The Outcome Document and wider international law therefore raise at least the possibility that the primary RtoP bearer concept is linked to the legal concept of statehood. Accordingly, it is useful to examine the way in which the primary RtoP bearer concept has been approached in territories which do not meet the requirements of statehood or, to put it another way, ‘in places that don’t exist’.<sup>357</sup> To do so, consideration can be given to the primary RtoP bearer concept in (i) Occupied Territories, specifically the Israel-Gaza conflict (2008-2009);<sup>358</sup> and (ii) secessionist enclaves, specifically the Russia-Georgia conflict over South Ossetia (2008).<sup>359</sup>

### 1.1.1 Occupied Territories: The Israel-Gaza Conflict (2008-2009)

The UN Fact Finding Mission’s Report<sup>360</sup> on the Israeli-Gaza conflict explicitly refers to the Outcome Document’s RtoP paragraphs and appears to identify two primary RtoP bearers for

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<sup>349</sup> Outcome Document (n 333), para 139.

<sup>350</sup> Outcome Document, *ibid*, para 138.

<sup>351</sup> Montevideo Convention (n 343), art 1.

<sup>352</sup> Outcome Document (n 333), para 138.

<sup>353</sup> Outcome Document, *ibid*.

<sup>354</sup> Outcome Document, *ibid*, para 139.

<sup>355</sup> Montevideo Convention (n 343), art 1.

<sup>356</sup> For e.g. explanatory note to art 1 of the UNGA Res on the Definition of Aggression (1974) expressly provides: ‘In this Definition the term ‘State’: (a) is used without prejudice to questions of recognition or to whether a State is a member of the United Nations’. UNGA Res 3314 (XXIX), ‘Definition of Aggression’ (14 December 1974) UN Doc A/RES/3314(XXIX).

<sup>357</sup> This phrase is borrowed from the title of Waters commentary on the role and effect of legal obligations in secessionist enclaves and other territories with disputed status. See C Waters, ‘Law in Places that Don’t Exist’ (2006) 34 Denv. J. Int’l L. & Pol’y 401.

<sup>358</sup> For facts on the conflict, including allegations of RtoP crimes, see International Coalition on the Responsibility to Protect, ‘The Crisis in Gaza: An RtoP Situation?’

<<http://responsibilitytoprotect.org/index.php/crises/178-other-rtop-concerns/2750-the-crisis-in-gaza>> 12 November 2012.

<sup>359</sup> On this conflict see especially, International Crisis Group, ‘Russia vs. Georgia: The Fall Out’ (2008), Europe Report No. 195 <[http://www.crisisgroup.org/~../195\\_russia\\_vs\\_georgia\\_the\\_fallout.pdf](http://www.crisisgroup.org/~../195_russia_vs_georgia_the_fallout.pdf)> accessed 12 November 2012 and Report of the Independent International Fact-Finding Mission on the conflict in Georgia, ‘Volume I’ (September 2009) <<http://www.ceiig.ch/Report.html>> accessed 12 November 2012.

<sup>360</sup> UNHRC, ‘Report of the UN Fact Finding Mission on the Gaza Conflict’ (15 September 2009) UN Doc A/HRC/12/48. (UNHRC, ‘Report of the UN Fact Finding Mission on the Gaza Conflict’).

the territory.<sup>361</sup> Firstly, the domestic authorities of Gaza.<sup>362</sup> Although the Report does not elaborate upon *who* the Mission consider these authorities to include, its direction that this responsibility extends so far as their ‘authority and means’<sup>363</sup> allow, suggests that the Mission interpreted this responsibility to be qualified by their means. Secondly, the Occupying Power (the Israeli Government).<sup>364</sup> The Report does not elaborate upon the nature of this responsibility nor does it qualify it. If one accepts that the Mission considered both Israeli and Gaza authorities as primary RtoP for Gaza’s populations, then it is contestable that primary RtoP may be a *diffuse responsibility* in contexts of Occupation, divided between bearers by their ‘authority and means’.<sup>365</sup>

### 1.1.2 Secessionist Enclaves: The Russia-Georgia Conflict (2008)

During the Russia-Georgia conflict, Russia’s Foreign Minister stated<sup>366</sup> that Russia’s use of armed force against Georgia was part of its ‘responsibility to protect [...] Russian *citizens*’<sup>367</sup> residing in the secessionist enclave of South Ossetia. The explicit reference to ‘citizens’<sup>368</sup> resonates with the direct relationship between State and population inherent in primary RtoP, suggesting that Russia sought to act under *primary* RtoP (although their use of force directly contradicts the nature and scope of primary RtoP measures).<sup>369</sup> This suggests that Russia did

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<sup>361</sup> UNHRC, ‘Report of the UN Fact Finding Mission on the Gaza Conflict’, *ibid*, 531 [citing the Outcome Document’s RtoP provisions] and 520 [outlining the protective responsibility of the domestic authorities of Gaza and Israel].

<sup>362</sup> UNHRC, ‘Report of the UN Fact Finding Mission on the Gaza Conflict’, *ibid*.

<sup>363</sup> UNHRC, ‘Report of the UN Fact Finding Mission on the Gaza Conflict’, *ibid*.

<sup>364</sup> UNHRC, ‘Report of the UN Fact Finding Mission on the Gaza Conflict’, *ibid*.

<sup>365</sup> UNHRC, ‘Report of the UN Fact Finding Mission on the Gaza Conflict’, *ibid*.

<sup>366</sup> “[U]nder the Constitution [the President] is obliged to protect the life and dignity of Russian citizens, especially when they find themselves in the armed conflict. And today he reiterated that the peace enforcement operation enforcing peace on one of the parties which violated its own obligations would continue until we achieve the results. According to our Constitution there is also responsibility to protect – the term which is very widely used in the UN when people see some trouble in Africa or in any remote part of other regions. But this is not Africa to us, this is next door. This is the area, where Russian citizens live. So the Constitution of the Russian Federation, the laws of the Russian Federation make it absolutely unavoidable to us to exercise responsibility to protect”. “Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC” (*Ministry of Foreign Affairs of the Russian Federation*, Moscow, 9 August 2008)

<[www.ln.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcb3/f87a3fb7a7f669ebc32574a100262597?OpenDocument](http://www.ln.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcb3/f87a3fb7a7f669ebc32574a100262597?OpenDocument)> accessed 11 May 2012 (“Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC”). See also, Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc S/PV/5952.

<sup>367</sup> “Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC”, *ibid*, emphasis and ellipsis added.

<sup>368</sup> “Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC”, *ibid* and Statement of the Representative of the *Russian Federation* to the UNSC, ‘UNSC Verbatim Record (8 August 2008) UN Doc S/PV/5952.

<sup>369</sup> Other commentators suggest that Russia sought to act under secondary RtoP. See e.g. G Evans, ‘Russia, Georgia and the Responsibility to Protect’ (2009) 2 (1) *Amsterdam Law Forum* 25 <<http://ojs.uvu.vu.nl/alf/article/view/58/115>> accessed 12 May 2012 and W Kemp, V Popovski and R Thakur (eds), *Blood and Borders: The Responsibility to Protect and the Problem of the Kin-State* (UN University Press, Tokyo 2011) 45, 58-60 and 236 See further, M Payandeh, ‘With Great Power Comes Great Responsibility? The

not consider the fact that its ‘citizens’<sup>370</sup> resided *outside* its territorial borders precluded it from acting as the primary RtoP bearer.

Examination of the UNSC’s responses<sup>371</sup> to the conflict suggests that the international community did not accept Russia’s claim to bear primary RtoP for Russian citizens residing in South Ossetia. Admittedly, no State explicitly referred to who does bear primary RtoP on behalf of the South Ossetian population. However, primary RtoP is founded upon the concept of State “sovereignty as responsibility”,<sup>372</sup> thereby suggesting that there should be some congruence between who bears primary RtoP and territorial sovereignty. There is therefore scope to argue that Russia was not recognised as the primary RtoP bearer by the number of States<sup>373</sup> which affirmed that Russia’s actions *violated* Georgia’s sovereignty and territorial integrity.

Furthermore, the UK<sup>374</sup> and the US<sup>375</sup> argued that Russia only acquired a duty to protect the South Ossetian population *following* its use of armed force, specifically when it *became an Occupying Force* in the enclave. The logical corollary of this is that these two States did not recognise Russia to bear primary RtoP in relation to Russian citizens residing in South Ossetia *prior* to its use of armed force against Georgia. Nevertheless, it raises the possibility that Russian State actors *acquired* a duty to protect the enclave’s population, including ethnic Georgians, when they became an Occupying Force in the territory. It is unclear what

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Concept of the Responsibility to Protect within the Process of International Lawmaking’ (2010) 35 Yale Journal of Int’l L. 469, 508-516.

<sup>370</sup> “Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC” (n 365); Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5952.

<sup>371</sup> See especially, UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5952; UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5951; UNSC Verbatim Record (10 August 2008) UN Doc S/PV.5953; UNSC Verbatim Record (19 August 2008) UN Doc S/PV.5961 and UNSC Verbatim Record (28 August 2008) UN Doc S/PV.5969.

<sup>372</sup> ICISS Report (n 331), 13. This has been endorsed as the basis of primary RtoP by States from across the geopolitical spectrum. See e.g. Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781; Statements of the Representatives of *Sri Lanka, Tanzania and Papua New Guinea* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statement of the Representative of *France* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 and Statements of the Representatives of *Japan* and *Nigeria* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98. State views endorsing the principle are detailed in Annex II (A) (b).

<sup>373</sup> See e.g. Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5951; Statements of the Representatives of *Belgium, Croatia* and the *United States* to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5952.

<sup>374</sup> The United Kingdom argued that: ‘It is hard to see how Russian actions are consistent with Russia’s claimed justification for their military assault — namely the protection of its peacekeepers and civilians in South Ossetia and Abkhazia, even though most of those civilians have only recently been handed Russian passports and have not lived in Russia’. Furthermore, the United Kingdom stated: ‘Russian forces in Georgia are now, in effect, *an army of occupation*, and they will remain so until they withdraw to the positions held prior to 7 August and force levels return to those that prevailed then. We remain gravely concerned too by the humanitarian situation in Georgia. We are particularly disturbed by reports of killings and ethnic cleansing perpetrated by South Ossetian and Abkhaz irregulars, in areas *controlled by Russian forces*. It goes without saying that *Russia has a legal and moral obligation to prevent such acts*, but, instead, what we have seen is the *eviction of virtually all ethnic Georgians* from South Ossetia’, emphasis added. Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (19 August 2008) UN Doc. S/PV.5969.

<sup>375</sup> The United States urged Russia to fulfil its ‘responsibility to prevent’ such violations in areas where Russia exercises de facto effective control. Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (19 August 2008), *ibid*.

underscored this decision but one issue which may have had some influence is that Georgia, by its own admission, did not have effective control over the secessionist enclave.<sup>376</sup> Accordingly, the Russia-Georgia conflict raises the possibility that the primary RtoP bearer concept can, in the specific context of secessionist enclaves, be determined on the basis of which “State” actors are in *effective control* of the territory.

### 1.1.3. The Primary RtoP bearer Concept in Non-State Territories

The two case studies suggest that the requisite relationship between the primary RtoP bearer and beneficiary is that both reside on the *same territory*.<sup>377</sup> Admittedly, the Outcome Document does not expressly address primary RtoP’s territorial scope. However, examination of the drafting history suggests that the primary RtoP bearer concept was *intended* to be territorially defined. Originally, paragraph 138 read as ‘[e]ach individual State, *first and foremost*’<sup>378</sup> owes ‘populations’<sup>379</sup> primary RtoP. This was later altered to ‘[e]ach individual State’<sup>380</sup> owes primary RtoP to ‘*its* populations’.<sup>381</sup> Arguably, ‘first and foremost’<sup>382</sup> may have been erased because it could have suggested that third States were residual bearers of primary RtoP. Thus, by removing the terms ‘first and foremost’<sup>383</sup> and inserting the term ‘its’,<sup>384</sup> States indicated that the relationship between the primary RtoP bearer (State) and beneficiary (populations) should be territorially defined<sup>385</sup> and not, as the

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<sup>376</sup> *Application Instituting Proceedings, Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia vs. Russian Federation)* 12th August 2008 and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia vs. Russian Federation*, 15th October 2008, ICJ Reports 5. On the effective control test in the context of this conflict, see further S Talmon, ‘The Responsibility of Outside Powers for Acts of Secessionist Entities’ (2009) 58 ICLQ 413.

<sup>377</sup> Outcome Document (n 333), para 138.

<sup>378</sup> UNGA President, ‘Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005’ (5 August 2005) UN Doc A/59/HLP/CRP.1/Rev.2, 28. (UNGA President, ‘Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005’).

<sup>379</sup> UNGA President, ‘Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005’, *ibid*.

<sup>380</sup> Outcome Document (n 333), para 138.

<sup>381</sup> Outcome Document, *ibid*. Schabas is one of few commentators to recognise the significance of the term ‘its’ in relation to the Outcome Document’s primary RtoP provisions. In his view, the term reinforces the fact that the Outcome Document does not provide for third States to use armed force to protect populations of third States and, therefore, for any new exception to the prohibition on armed force. See W A Schabas, *Report: Preventing Genocide and Mass Killing: The Challenge for the United Nations* (Minority Rights Group International, London 2006) 14.

<sup>382</sup> UNGA President, ‘Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005’ (n 377), 28.

<sup>383</sup> UNGA President, ‘Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005’, *ibid*.

<sup>384</sup> Outcome Document (n 333), para 138.

<sup>385</sup> Commentators have reasoned the removal of the phrase ‘first and foremost’ differently. Bellamy has, for example, contended that the phrase was removed because it implied that the nature of the responsibilities of the State and international community were of a similar character. See particularly A Bellamy, ‘Whither the

Russian Foreign Minister suggested, to ‘citizens’<sup>386</sup> residing within the territory of another “State”.

Arguably, a persuasive rationale underscores the State-centric and territorial character of the approaches taken to the primary RtoP bearer concept to date. Human rights, including minority rights, identify the “State” as the duty bearer.<sup>387</sup> Additionally, State actors have a duty to respect the human rights of those who reside in territories under their effective control.<sup>388</sup> Similarly, international humanitarian law provides that the Occupying Power has a duty to protect the population of the Occupied Territory from humanitarian law violations.<sup>389</sup> Thus, recognising those State actors who are in a position of effective control/Occupation to bear primary RtoP, either partly or wholly, is consistent with the nature of the existing international humanitarian and human rights law duties to which primary RtoP relates.

Perhaps most significantly, a State-centric and territorially defined primary RtoP bearer concept helps to circumvent some of the implications inherent in recognising that the relationship between primary RtoP bearer and beneficiary can entail an extraterritorial character. An extraterritorial approach could blur the distinction between RtoP and controversial concepts such as the Protection of Nationals abroad<sup>390</sup> and Humanitarian Intervention. The general implication of this would be that it undermines the very debate which RtoP was constructed to resolve, namely the legality and legitimacy of third States using unauthorised force to “protect” populations.<sup>391</sup> The field of minority protection can also be drawn upon here. An extraterritorial primary RtoP bearer concept could encourage Kin States to interfere in the internal affairs of the State in which a territorially cohesive minority resides. This would contradict the principle that a Kin State’s ‘constitutionally

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Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit’ (2006) 20 (2) *Eth & Intl Aff* 143, 163-64.

<sup>386</sup> “Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC” (n 365) and Statement of the Representative of the *Russian Federation* to the UNSC, ‘UNSC Verbatim Record (8 August 2008) UN Doc S/PV/5952.

<sup>387</sup> For example, the preamble to the International Covenant on Civil and Political Rights opens with reference to who undertakes the obligations therein, namely “[t]he States Parties to the present Covenant”. International Covenant on Civil and Political Rights 1966 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, preambular para 1. (ICCPR).

<sup>388</sup> UN Human Rights Committee, ‘General Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 (UN Human Rights Committee, ‘General Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant’); European Court of Human Rights, *Al Skeini & Others v. The United Kingdom*, 2011, *Application No. 55721/07*, para 74 (*Al Skeini & Others v. The United Kingdom*, 2011) and D Gierczyk, “The Responsibility to Protect: A Legal and Rights-Based Perspective” in A Bellamy, S E Davies and L Glanville (eds), *The Responsibility to Protect and International Law* (Martinus Nijhoff, Leiden 2011) 109-113.

<sup>389</sup> In terms of treaty law, the Fourth Geneva Convention outlines some of the main humanitarian law duties of the Occupying Power. See generally, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287. (Geneva Convention Relative to the Protection of Civilian Persons in Time of War).

<sup>390</sup> This has also been noted by T Ruys, ‘The “Protection of Nationals” Doctrine Revisited’ (2008) 13 (2) *Journal of Conflict & Security Law* 233, 267-68 and Evans, ‘Russia, Georgia and the Responsibility to Protect’ (n 368).

<sup>391</sup> See e.g. ICISS Report (n 331), 1-3.

declared responsibility<sup>392</sup> to protect a minority group residing in another State's territory 'does not imply, in any way, a right under international law to exercise jurisdiction over these persons on the territory of another State without that State's consent'.<sup>393</sup>

Using factors like "effective control" to establish a territorial relationship between the primary RtoP bearer and beneficiary raises some significant questions, particularly whether this ensures populations protection in non-"State" territories adequately. The fundamental issue here is the difference between *recognising* and *enforcing* a duty. Practice to date suggests that religious and/or ethnic grievances may make the bearer unwilling to implement primary RtoP effectively. For example, Israel<sup>394</sup> does not seem to accept that it partly bears the primary RtoP duty owed to the Gaza population but, instead, that its duty to protect the population residing within its territorial borders supersedes that which it partly owes the population under its Occupation.<sup>395</sup> Another illustration is that when in a position of effective control, Russia reportedly failed to uphold the human rights of the ethnic Georgians residing in South Ossetia.<sup>396</sup>

## 1.2 "National Authorities"

The Outcome Document provides that secondary RtoP' activation of secondary RtoP's 'timely and decisive'<sup>397</sup> response pillar is to be partly adjudged on the basis of 'national authorities manifestly failing'<sup>398</sup> to protect their populations from RtoP crimes. The logical implication of this is that it is States' 'national authorities'<sup>399</sup> who are responsible for *fulfilling* primary RtoP. Thus, the ways in which the primary RtoP bearer concept has been approached in contexts where there are competing claims for recognition as a State's "national authorities" merits further reflection. To do so, the actors identified or alluded to as the primary RtoP bearer in the case studies of Kenya, Zimbabwe, Côte d'Ivoire, Libya and

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<sup>392</sup> OSCE: High Commissioner for National Minorities, *The Bolzano/Bozen Recommendations on National Minorities and Inter-State Relations and Explanatory Note* (OSCE HCNM, the Netherlands 2008) 5, para 4. (OSCE: High Commissioner for National Minorities, *The Bolzano/Bozen Recommendations*).

<sup>393</sup> OSCE: High Commissioner for National Minorities, *The Bolzano/Bozen Recommendations*, *ibid*, 6, para 4.

<sup>394</sup> Statement of the Representative of *Israel* to the UNSC, UNSC Verbatim Record (31 December 2008) UN Doc S/PV.6060.

<sup>395</sup> The Israeli Representative stated: 'Israel cannot, and will not, allow its citizens to be sitting ducks for terrorist attacks. Israel will continue to take all necessary measures to protect its citizens and stop terrorism. Members of the Council must ask themselves what they would do in the same situation if their citizens were terrorized on a daily basis. *Protecting the lives and well-being of one's citizens is not only a right, but also a responsibility of every sovereign State*. With its military operation, the State of Israel is fulfilling that responsibility', emphasis added. Statement of the Representative of *Israel* to the UNSC, *ibid*.

<sup>396</sup> Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (19 August 2008) UN Doc S/PV.5969.

<sup>397</sup> Outcome Document (n 333), para 139.

<sup>398</sup> Outcome Document, *ibid*.

<sup>399</sup> Outcome Document, *ibid*.



Syria should be considered.

### 1.2.1 Contested National Election Results Require Verification: Kenya and Zimbabwe (2008)

In Kenya and Zimbabwe, national elections led to mass human rights violations and the alleged perpetration of RtoP crimes. In both cases, national election results were disputed by one or more political parties. Relevant international actors<sup>400</sup> took a relatively uniform position on who would bear primary RtoP *whilst the election results were being reviewed*. In Zimbabwe, the government which was in power before the national election and the paramilitary groups and security forces under its control were identified as primary RtoP bearers.<sup>401</sup> Furthermore, ‘political leaders on both sides’<sup>402</sup> were urged to ensure that their supporters did not incite or use violence against opposition supporters. In Kenya, the Special Adviser for the Prevention of Genocide [SAPG] urged ‘political and community leaders’<sup>403</sup> to fulfil primary RtoP, whilst the UNSC called upon ‘Kenya’s political leaders’<sup>404</sup> to ensure populations’ protection. Thus, Kenya and Zimbabwe suggest that in cases of disputed national election results, primary RtoP may be owed by those (i) who are, by reason of their previous governmental role, in a position of effective control; and (ii) who claim electoral victory and, if the election results are verified as being in their favour, may subsume effective control. This suggests that in contexts involving disputed national election results the primary RtoP bearer concept will essentially be *shared* by both political parties and, at least in the view of the SAPG, by those who exercise some influence over the population like ‘community leaders’.<sup>405</sup>

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<sup>400</sup> Statement of the UNSC President, ‘Situation in Kenya’ (6 February 2008) UN Doc S/PRST/2008/4 (Statement of the UNSC President, ‘Situation in Kenya’); Statement by the UN High Commissioner for Human Rights in UN Press Release, ‘Alarmed by Violence in Zimbabwe Arbour Urges Restraint’ (27 April 2008) <<http://www.unhchr.ch/huricane/hurricane.nsf/view01/BB073B7B294BC46FC1257438003A0672?opendocument>> accessed 12 May 2012 (UN Press Release, ‘Alarmed by Violence in Zimbabwe Arbour Urges Restraint’); Statement by the UN Deputy Secretary General to the UNSC, UNSC Verbatim Record (8 July 2008) UN Doc S/PV.5929 (Statement by the UN Deputy Secretary General to the UNSC, UNSC Verbatim Record, 8 July 2008) and Statement of the UN Special Adviser to the UN Secretary-General on the Prevention of Genocide, ‘The Situation in Kenya’ (28 January 2009) cited in UN Department of Public Information, ‘The United Nations and Kenya: Briefing Note’ (7 February 2008) 4 <<http://www.responsibilitytoprotect.org/files/Feb%202008%20Kenya%20UN%20briefing%20note.pdf>> accessed 12 November 2012. (Statement of the SAPG cited in UNDPI, ‘The United Nations and Kenya: Briefing Note’).

<sup>401</sup> Statement by the UN Deputy Secretary General to the UNSC, UNSC Verbatim Record, 8 July 2008, *ibid*.

<sup>402</sup> Statement of the UNSC President, ‘Situation in Kenya’ (6 February 2008) (n 399) and UN Press Release, ‘Alarmed by Violence in Zimbabwe Arbour Urges Restraint’ (n 399).

<sup>403</sup> Statement of the SAPG cited in UNDPI, ‘The United Nations and Kenya: Briefing Note’ (n 399), 4.

<sup>404</sup> Statement of the UNSC President, ‘Situation in Kenya’ (n 399).

<sup>405</sup> Statement of the SAPG cited in UNDPI, ‘The United Nations and Kenya: Briefing Note’ (n 399).

### 1.2.2 The then Existing Government will not concede Power to the Internationally recognised Government: The Côte d'Ivoire (2010)

Amidst ongoing dispute regarding the results of the 2010 Côte d'Ivoire national elections,<sup>406</sup> the UNSC determined that the President Elect (Ouattara) was the "legitimate"<sup>407</sup> President of the Côte d'Ivoire and interlocutor with the international community. Ouattara was unable to assume effective control of the State because the then existing President (Laurent Gbagbo<sup>408</sup>) would not concede power, leading to further violent clashes between Gbagbo and Ouattara supporters.<sup>409</sup> Despite this, the UNSC accepted Ouattara's consent for the expansion of the peacekeeping force serving in the Côte d'Ivoire.<sup>410</sup> Given that the UN Secretary-General's [UNSG] 2009 RtoP Report provides that the deployment of peacekeepers depends upon the State (i.e. the primary RtoP bearer) providing consent,<sup>411</sup> it is arguable that the UNSC recognised Ouattara to bear primary RtoP.

Other actors seemed to recognise the primary RtoP bearer more broadly. The UNSG and his Special Advisers on the Prevention of Genocide and Responsibility to Protect called upon 'all parties in the Côte d'Ivoire'<sup>412</sup> to fulfil primary RtoP and, furthermore, referred to the RtoP-type crimes being committed by the militia and armed group's under the then existing President's control (Laurent Gbagbo).<sup>413</sup> Arguably, these non-State groups were considered to also bear primary RtoP by reason of presumably falling within the scope of 'all parties in the Côte d'Ivoire'.<sup>414</sup> Accordingly, there is scope to argue that relevant actors considered that

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<sup>406</sup> See Bellamy and William's discussion of the Ivoirian Constitutional Council's decision that there had been vote rigging and, therefore, that Gbagbo was the rightful winner. A Bellamy and P D Williams, 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect' (2011) 87 (4) Int. Affairs 825, 832.

<sup>407</sup> See e.g. UNSC Verbatim Record (7 December 2010) UN Doc S/PV.6437.

<sup>408</sup> For an interesting discussion of the way in which the previous government of the Côte d'Ivoire came to be recognised by the international community and the potential disadvantages of this, see A Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press, Cambridge 2009) 148.

<sup>409</sup> On the situation, see particularly Human Rights Watch News Release, 'Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians during Offensive' (*Human Rights Watch*, 9 April 2011) <<http://www.hrw.org/news/2011/04/09/cote-d-ivoire-ouattara-forces-kill-rape-civilians-during-offensive>> accessed 14 August 2011.

<sup>410</sup> UNSC Verbatim Record (7 December 2010) UN Doc S/PV.6437.

<sup>411</sup> UNSG Report 2009, Implementing RtoP (n 331), 18. See also, UNHRC, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' (30 March 2010) UN Doc A/HRC/14/43, 18 and International Law Commission, 'Protection of Persons in the Event of Disasters' (22 July 2009) UN Doc A/CN.4/SR.3019, 3.

<sup>412</sup> UN Press Release, 'UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire' (29 December 2010) <<http://www.un.org/en/preventgenocide/adviser/pdf/Special%20Advisers'%20Statement%20on%20Cote%20d'Ivoire,%2029%20.12.2010.pdf>> accessed 12 May 2012 ('UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire', 29 December 2010). See further, UN Press Release, 'Statement attributed to the UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire' (19 January 2011) <<http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG,%20Special%20Advisers'%20Statement%20on%20Cote%20d'Ivoire,%2019%20Jan%202011.pdf>> accessed 12 May 2012. ('Statement attributed to the UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire', 19 January 2011).

<sup>413</sup> 'UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire', 29 December 2010, *ibid*.

<sup>414</sup> 'UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire', 29 December 2010, *ibid* and 'Statement attributed to the UN Secretary-General's

both the internationally recognised President *and* the then existing President owed primary RtoP.

### 1.2.3 The Existing Government Faces an Armed Insurrection due to Perpetrating RtoP Crimes: Libya and Syria (2011-onward)

In Libya and Syria, relevant actors recalled the ‘Libyan authorities’<sup>415</sup> and ‘Syrian authorities’<sup>416</sup> primary RtoP duty. There was a general consensus that the “government” of each State who were in a position of effective control when the RtoP crimes began being perpetrated (i.e. the Gaddafi and Al-Assad regime) fell within the scope of the “authorities” of Libya and Syria and, therefore, owed primary RtoP. To this effect, reference was made by a range of different actors to the Libyan/Syrian “government”<sup>417</sup> owing primary RtoP. However, it appears that “national authorities” (and therefore the primary RtoP bearer concept) was construed in a wider sense than simply the requisite divisions of each States’ “government”. For example, the Special Advisers on the Prevention of Genocide and Responsibility to Protect explicitly stated that primary RtoP was owed in Syria by ‘both State and non-State actors’<sup>418</sup>, calling upon ‘all parties’<sup>419</sup> to uphold human rights law. Some third States’ approaches to the political opposition groups which formed in Libya and Syria in response to the existing government’s perpetration of RtoP crimes may also be significant.

A number of third States and other relevant actors made declarations regarding the

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Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d’Ivoire’, 19 January 2011 (n 411).

<sup>415</sup> UNSC Res 1970 (2011) UN Doc S/RES/1970, preambular para 9 (UNSC Res 1970) and UNSC Res 1973 (2011) UN Doc S/RES/1973, preambular para 4. (UNSC Res 1973).

<sup>416</sup> See e.g. UNHRC Res S-16/1, ‘The Current Human Rights Situation in the Syrian Arab Republic in the Context of Recent Events’ (29 April 2011) UN Doc A/HRC/RES/S-16/1, para 1 (UNHRC Res S-16/1) and UNHRC Res S-19/1, ‘The Deteriorating Situation of Human Rights in the Syrian Arab Republic, and the Recent Killings in El-Houleh’ (4 June 2012) UN Doc A/HRC/RES/S-19/1, para 5.

<sup>417</sup> In relation to Libya, see UNHRC Res S-15/1, ‘The Situation of Human Rights in the Libyan Arab Jamahiriya’ (25 February 2011) UN Doc A/HRC/S-15/1, para 2 (UNHRC Res S-15/1). In relation to Syria, see e.g. Draft UNSC Resolution (4 February 2012) UN Doc S/2012/77, para 2 (Draft UNSC Resolution, 4 February 2012); Draft UNSC Resolution (4 October 2012) UN Doc S/2011/612, para 5 (Draft UNSC Resolution, 4 October 2012); UN Press Release, ‘Statement by the Special Advisers of the United Nations Secretary-General, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria’ (2 June 2011) <<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 11 August 2012. See further, UN Press Release, ‘Marking a full year of violent suppression of anti-government protests in Syria, the United Nations Secretary-General’s Special Advisers on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, release the following statement’ (15 March 2012) <<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 12 August 2012.

<sup>418</sup> UN Press Release, ‘The UN Secretary-General’s Special Advisers on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, urge immediate action to end violence in Syria’ (10 February 2012) <<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 12 August 2012. (‘The UN Secretary-General’s Special Advisers on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, urge immediate action to end violence in Syria’, 10 February 2012).

<sup>419</sup> ‘The UN Secretary-General’s Special Advisers on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, urge immediate action to end violence in Syria’, *ibid*.

Libyan National Transitional Council<sup>420</sup> [NTC] and Syrian National Council<sup>421</sup> [SNC]. The substance of these declarations varied. Several States declared the NTC and/or SNC as the ‘legitimate representatives’<sup>422</sup> of the Libyan/Syrian people. A smaller number of declarations, including those of the UK,<sup>423</sup> US,<sup>424</sup> France<sup>425</sup> and the EU,<sup>426</sup> provided that the TNC and/or SNC are the most “legitimate” authority in the State(s). The TNC and/or SNC were also declared to be the ‘legitimate interlocutor with the international community’.<sup>427</sup> The significance of these declarations in terms of the primary RtoP bearer differs. Primarily, all of the declarations of the TNC and/or SNC’s legitimacy should not be conflated with statements regarding the *recognition of new governments*. Some of these statements are considered to be politically significant, conferring a degree of legitimacy and standing upon the opposition group(s).<sup>428</sup> Nevertheless, it is arguable that some of the declarations and/or

<sup>420</sup> See especially, UK Foreign Commonwealth Office, ‘Libya Contact Group Meeting Concludes’ (15 July 2011) <<http://www.fco.gov.uk/en/news/latest-news/?view=News&id=631324382>> accessed 14 August 2011 (UK FCO, ‘Libya Contact Group Meeting Concludes’); National Transitional Council, ‘International Recognition’ <<http://www.ntclibya.com/InnerPage.aspx?SSID=6&ParentID=3&LangID=1>> accessed 14 August 2011.

<sup>421</sup> See generally, Syrian National Council, ‘Syrian National Council Worldwide’ <<http://www.syriancouncil.org/en/snc-worldwide/snc-map.html>> accessed 12 May 2012.

<sup>422</sup> With respect to Libya, see particularly the declarations of the Maldives and Senegal in The President’s Office Republic of Maldives, ‘Maldives Recognises Libyan National Council as Sole Representative of the Libyan People’ (3 April 2011) <<http://www.presidencymaldives.gov.mv/Index.aspx?lid=11&dcid=5071>> accessed 7 August 2012 and ‘Senegal Grants Diplomatic Recognition to Libyan Rebels’ (*Star Africa*, 28 May 2011) <<http://www.starafrika.com/en/news/detail-news/view/senegal-grants-diplomatic-recognition-to-168769.html>> accessed 7 August 2012. In relation to the SNC, see especially the declarations of Spain and the European Union at Local Coordination Committees of Syria, ‘Spain Considers the SNC the Representative of the Syrian People’ (25 November 2011) <<http://www.lccsyria.org/2807>> accessed 7 August 2012 and ‘EU Ministers Recognise Syrian National Council as Legitimate Representatives’ (*The Journal.ie*, Dublin, 27 February 2012) <<http://www.thejournal.ie/eu-ministers-recognise-syrian-national-council-as-legitimate-representatives-367277-Feb2012/>> accessed 7 August 2012.

<sup>423</sup> Indeed, when recognising the SNC’s “legitimacy”, the UK Foreign Secretary noted that ‘they are not in control - the Syrian National Council - of any part of Syria’. UK Foreign Commonwealth Office, ‘Foreign Secretary: “We Have to Intensify Pressure on Syria”’ (24 February 2012) <<http://www.fco.gov.uk/en/news/latest-news/?id=734211682&view=News>> accessed 12 May 2012 (UK FCO, ‘Foreign Secretary: “We Have to Intensify Pressure on Syria”’). On Libya see UK FCO, ‘Libya Contact Group Meeting Concludes’ (n 419).

<sup>424</sup> E Labott, ‘Clinton to Syrian Opposition: Ousting al-Assad is Only First Step in Transition’ (*CNN*, 6 December 2011) <[http://articles.cnn.com/2011-12-06/middleeast/world\\_meast\\_clinton-syrian-opposition\\_1\\_assad-syrian-opposition-syrian-national-council?\\_s=PM:MIDDLEEAST](http://articles.cnn.com/2011-12-06/middleeast/world_meast_clinton-syrian-opposition_1_assad-syrian-opposition-syrian-national-council?_s=PM:MIDDLEEAST)> accessed 12 May 2012.

<sup>425</sup> SNC, ‘The Syrian National Council Meets with the French Minister of Foreign Affairs and the EU High Representative of Foreign Affairs’ (24 November 2011) <<http://www.syriancouncil.org/en/press-releases/item/546-the-syrian-national-council-meets-with-the-french-minister-of-foreign-affairs-and-the-eu-high-representative-of-foreign-affairs.html>> accessed: 12 May 2012.

<sup>426</sup> On Syria, see SNC, ‘SNC Welcomes EU’s Recognition of the SNC’ (28 February 2012) <<http://www.syriancouncil.org/en/press-releases/item/588-snc-welcomes-eu-s-recognition-of-the-snc.html>> accessed 12 May 2012.

<sup>427</sup> With respect to the NTC see e.g. Italy’s declaration in Farnesina Ministry of Foreign Affairs, ‘Focus-Libya: Frattini, the NTC is Libya’s Only Interlocutor’ (4 April 2011) <[http://www.esteri.it/MAE/EN/Sala\\_Stampa/ArchivioNotizie/Approfondimenti/2011/04/20110404\\_FocusLibia\\_f\\_rattini\\_Cnt.htm](http://www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Approfondimenti/2011/04/20110404_FocusLibia_f_rattini_Cnt.htm)> accessed 7 August 2012. In relation to Syria, see e.g. France’s declaration in A Rettman, ‘France Recognises Syrian Council, Proposes Military Intervention’ (*EU Observer*, 24 November 2011) <<http://euobserver.com/defence/114380>> accessed 7 August 2012.

<sup>428</sup> Talmon observes that similar declarations were made with respect to the Palestinian Liberation Organisation (PLO). Significantly, these declarations explicitly noted that they should not be construed as the formal recognition of the PLO as the “government” of Palestine. Talmon considers that this can help opposition groups to circumvent some of the practical limitations which have been imposed upon their struggle for leadership by reason of the international community’s response to the perpetration of RtoP crimes. For example, such declarations are considered to legitimate the standing of the opposition groups in third States, thereby enabling them to access, on behalf of the people of the State, the funds of the “government” which is implicated in the

wider actions of third States are intended to be construed as the formal recognition of the TNC and/or SNC as the new government. First, declaring the TNC/SNC as the “legitimate authority” of the State or “legitimate interlocutor” with the international community can be legally significant because they ‘usually indicate some capacity of representing the State’.<sup>429</sup> Second, it is notable that the UK does not explicitly recognise new governments<sup>430</sup> but, rather, leaves its recognition to be inferred through the ‘nature of the dealings’<sup>431</sup> which it has with groups’ claiming governmental recognition. Arguably, the UK’s supply of police equipment to the TNC<sup>432</sup> and practical assistance to the Syrian opposition<sup>433</sup> may fall within this. Whilst it is important to note that no declaration explicitly recognised the opposition groups to bear primary RtoP, this should be offset with the fact that States’ governments are generally recognised to bear primary RtoP. Thus, if some of the declarations constitute government recognition then they may also, albeit indirectly, recognise the opposition groups as primary RtoP bearers. If so, the recognition of the “national authorities” which bear primary RtoP may sometimes be directly linked to the formal recognition of new governments.<sup>434</sup>

Notwithstanding this, the February 2012<sup>435</sup> and October 2011<sup>436</sup> draft UNSC Resolutions on Syria recalled the primary RtoP duty of the Syrian “government”. The Resolutions make no comment on who they consider the “government” to be. However, the February Draft Resolution refers to the Syrian government’s duty to comply with its international legal obligations<sup>437</sup> and the need for the Syrian government to cooperate with the Peace Plan.<sup>438</sup> Accordingly, the references to the “government” seem to be directed at the Al-Assad regime because it is this regime that continues to represent Syria in the UN Human Rights Council<sup>439</sup> [UNHRC] and was charged with ensuring the effectiveness of the UN Observer

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perpetration of RtoP crimes which have been frozen by the third State. On these issues, see S Talmon, ‘Recognition of the Libyan Transitional Council’ (2011) 15 (16) Am. S. Int’l L. Insights <<http://www.asil.org/insights/110616.cfm>> accessed 7 August 2012.

<sup>429</sup> Talmon, ‘Recognition of the Libyan Transitional Council’, *ibid*.

<sup>430</sup> Talmon, ‘Recognition of the Libyan Transitional Council’, *ibid*. See further, C Warbrick, “States and Recognition in International Law” in M Evans (ed), *International Law* (2nd edn OUP, Oxford 2006) 256.

<sup>431</sup> Warbrick, *ibid*.

<sup>432</sup> UK Foreign Commonwealth Office, ‘UK Provides Equipment to the National Transitional Council in Libya’ (30 June 2011) <<http://www.fco.gov.uk/en/news/latest-news/?view=PressS&id=624285882>> accessed 14 August 2011.

<sup>433</sup> The Foreign Secretary said that the practical assistance would be ‘non-lethal’ and would likely include measures such as the provision of mobile phones and radio equipment to the opposition groups. United Kingdom Foreign Commonwealth Office, ‘Foreign Secretary Statement on Syria’ (10 August 2012) <<http://www.fco.gov.uk/en/news/latest-news/?id=798971582&view=News>> accessed 14 August 2012.

<sup>434</sup> The rationale and significance of this at a policy and legal level are discussed below.

<sup>435</sup> Draft UNSC Resolution, 4 February 2012 (n 416), para 2.

<sup>436</sup> Draft UNSC Resolution, 4 October 2012 (n 416), para 5.

<sup>437</sup> Draft UNSC Resolution, 4 February 2012 (n 416), para 2.

<sup>438</sup> Draft UNSC Resolution, *ibid*, para 5.

<sup>439</sup> See e.g. Statement of the Representative of the *Syrian Arab Republic* to the UNHRC in UN Press Release, ‘Human Rights Council Requests Commission of Inquiry to Conduct a Special Inquiry in the Events in El Houleh’ (1 June 2012)

Mission.<sup>440</sup> Significantly, the February draft Resolution was sponsored by some of the States who appear, through their declarations or wider actions, to have recognised the Syrian opposition as the “government” *before* proposing the draft Resolution.<sup>441</sup> This raises the possibility that where the “government” of a State is considered to have manifestly failed to protect its population and a “legitimate” political opposition group emerges, the primary RtoP bearer concept may be *concurrent*. Specifically, primary RtoP may be held by two “governments” when (i) one “government” has had international support for it explicitly withdrawn; and (ii) the other “government” has not yet attained sufficient levels of formal recognition to be considered as the only “government” of the State.

#### 1.2.4 The Primary RtoP Bearer Concept in States with Competing “National Authorities”

The primary RtoP bearer concept in States where there are competing claims to represent the “national authorities” will often be pursuant to existing international obligations. Recognising that all aspects of the “government” bear primary RtoP is consistent with the fact that existing human rights treaty obligations are owed by ‘[a]ll branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local’.<sup>442</sup>

Wider existing obligations can also help us to understand why some actors have been identified as primary RtoP bearers. A key example is the Secretary-General’s Special Advisers reference to Syrian non-State actors also owing primary RtoP.<sup>443</sup> Admittedly, this seems to differ from the concept of the duty-bearer in the field of human rights. Here, the State is considered to bear the duty and, as part of this duty, is required to ensure that the populations’ human rights are *not violated* by non-State actors.<sup>444</sup> However, the crimes which primary RtoP covers are not only connected to human rights law. Genocide, war crimes and

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<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12215&LangID=E>> accessed 7 July 2012.

<sup>440</sup> UNSC Resolution 2042 (14 April 2012) UN Doc S/RES/2042, para 6.

<sup>441</sup> France and the United Kingdom are prominent examples. See list of sponsors of Draft UNSC Resolution, 4 February 2012 (n 416).

<sup>442</sup> UN Human Rights Committee, ‘General Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant’ (n 387), 2. In addition, the bearer of the duty under Article 27 of the International Covenant on Civil and political Rights has been outlined as ‘the State Party itself, whether through its legislative, judicial or administrative authorities’. UN Human Rights Committee, ‘General Comment 23: Article 27- Rights of Minorities’ (Fiftieth Session, 1994), para 6.1. (UN Human Rights Committee, ‘General Comment 23: Article 27- Rights of Minorities’).

<sup>443</sup> ‘The UN Secretary-General’s Special Advisers on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, urge immediate action to end violence in Syria’, 10 February 2012 (n 417).

<sup>444</sup> For e.g. the Human Rights Committee provides that Article 27 of the International Covenant on Civil and Political Rights requires that the rights are ‘protected against their denial and violation’ and therefore that the State party should not only protect the right from denial or violations by the ‘acts of the State Party itself’ but also from denial or violation by ‘the acts of other persons within the State Party’. UN Human Rights Committee, ‘General Comment 23: Article 27- Rights of Minorities’ (n 441), para 6.1.

crimes against humanity are mass atrocity crimes for which international criminal law provides individual criminal responsibility.<sup>445</sup> The reference to non-State actors as primary RtoP bearers may therefore have been made in order to recall the fact that, although State actors are mainly responsible for implementing primary RtoP, this does not mean that other actors have *no* responsibilities whatsoever. Whilst non-State actors cannot perform several positive primary RtoP duties (e.g. ratifying human rights law instruments, referring the situation to the ICC), they can help to fulfil primary RtoP by not perpetrating RtoP crimes and encouraging those under their control/influence (e.g. members of armed groups) not to do so. Moreover, recalling that non-State actors bear primary RtoP reiterates that an armed insurrectional movement which becomes the new government can engage the State's responsibility for any violations of erga omnes obligations which were committed by forces under its authority during the struggle for political power.<sup>446</sup>

On the one hand, the fact that the primary RtoP bearer concept is not limited to the government suggests that determining the primary RtoP bearer in these contexts is not entirely synonymous with governmental recognition. Conversely, some of the declarations regarding recognition of the TNC and SNC as the legitimate authorities of Libya and Syria suggest that the scope of the primary RtoP bearer can at times be influenced by/linked to the process of government recognition. This interplay may be legally significant because it raises the possibility that the recognition of new governments in RtoP cases may be based upon the criteria of "legitimacy" and not the traditional test of "effective control". It is too early to suggest that "legitimacy" has become a new basis for recognising governments. However, it is useful to draw by analogy on the way in which "legitimacy" has been used to regulate the process of "State" recognition in the field of minority protection. In response to the dissolution of the Balkans and former Soviet Bloc, the EU adopted a set of criteria which the newly emerging "States" should fulfil in order to gain external recognition of their statehood.<sup>447</sup> A primary criterion was to put in place guarantees for minority protection within the new "State".<sup>448</sup> Admittedly, there is a clear difference between the recognition of new governments and that of States. Nevertheless, it is arguable that practice regarding the primary RtoP bearer reinforces the European Community's connection of external

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<sup>445</sup> For e.g. Article 5 of the Rome Statute provides that the ICC can have jurisdiction over genocide, crimes against humanity and war crimes. Article 25 provides for the principle of individual criminal responsibility for the perpetration of such crimes. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 art 5 (1) (a)-(c). (Rome Statute).

<sup>446</sup> UN Human Rights Committee, 'General Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (n 387), 2. This relates to the responsibility of internationally wrongful acts perpetrated by insurrectional movements, see e.g. P Dumberry, 'New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement' (2006) 17 (3) EJIL 605.

<sup>447</sup> European Community, 'Declaration on the Recognition of New States of New States in Eastern Europe and in the Soviet Union' (16 December 1991) reprinted in R Caplan, *Europe and the Recognition of New States in Yugoslavia* (CUP, Cambridge 2005) Appendix I, 187-188.

<sup>448</sup> European Community Declaration on State Recognition, *ibid* reprinted in Caplan, *ibid*, 187.

recognition (e.g. statehood/government), legitimacy and populations' protection (i.e. through minority rights/protection from RtoP crimes).

The idea that primary RtoP can be held concurrently in States where there are competing claims for recognition as "national authorities" is not novel. States have sometimes recognised the existence of two "governments" within one State, usually by recognising the government who is in effective control as the "de jure government" and the opposition group as the "de facto government".<sup>449</sup> The rationale for this approach is clear. External declarations of the "legitimacy" of the "de facto government" can help the group to gain domestic legitimacy because they begin to appear to the people of the State as a group which acts internally, and is understood externally, as a legitimate government.<sup>450</sup> However, this approach also entails implications for populations' protection. Whilst Kosovo falls outside the scope of RtoP practice, it can be used as a practical example of this drawback. The de jure government acts in parallel to Serbian leadership groups in parts of the territory.<sup>451</sup> In the sections of the territory where the Serbian leadership groups are operating, the population is effectively disassociated from the de jure government. For example, the Serbian leadership makes decisions regarding issues such as passports.<sup>452</sup> Thus, the field of minority protection highlights that two "governments" within a State can polarise certain sections of the population, thereby further undermining the development of an ethnically, racially or religiously cohesive society.<sup>453</sup>

### 1.3 The Primary RtoP Bearer Concept: General Findings

There is limited practice regarding the way in which the primary RtoP bearer concept will be tailored, if at all, to instances of secession, occupation, disputed election results and armed insurrections. Accordingly, the approaches delineated above may change in the course of future practice and should therefore be deemed *tentative conclusions*. Nevertheless, examination of the primary RtoP bearer concept in practice to date suggests that it may be *multifaceted*, taking hold in different contexts upon competing actors to varying extents. The primary RtoP concept may become diffuse in Occupied Territories but, in secessionist enclaves, be held by State actors who are in effective control. Furthermore, although the traditional standard of effective control may endure in relation to the recognition of "national authorities" in cases involving disputed national election results, it may be substituted for a

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<sup>449</sup> Warbrick (n 429), 254.

<sup>450</sup> Warbrick, *ibid*, 255.

<sup>451</sup> Commission of the European Communities, 'Commission Staff Working Document: Kosovo (under UNSC 1244/99) 2008 Progress Report' (5 November 2008) EU Doc SEC(2008)2697, 12.

<sup>452</sup> Commission of the European Communities, *ibid*.

<sup>453</sup> Chapter five critically examines the impact on minority groups of external recognition of the TNC and SNC as the legitimate authorities in Libya and Syria.



“legitimacy” approach by some relevant actors in cases where the democratically elected government cannot assume power or a government faces an armed insurrection for perpetrating RtoP crimes.

The primary RtoP bearer concept overlaps with the duty-bearer of some of the existing obligations to which it relates in several ways, including that (i) both are owed by ‘all branches of the government’;<sup>454</sup> (ii) non-State actors should refrain from violating human rights and may incur individual criminal responsibility for some violations;<sup>455</sup> and (iii) both primary RtoP and the duty to respect human rights/humanitarian law are owed by State actors in a position of effective control.<sup>456</sup> These overlaps suggest that the primary RtoP bearer concept may be best understood at that which *amalgamates* who bears and/or can be held accountable for violating, the existing human rights, criminal and humanitarian obligations to which it relates. The table summarises the approaches taken to the primary RtoP bearer concept in practice to date.

Table A: The Primary RtoP Bearer Concept

Context	Bearer(s)	General Approach to the Primary RtoP Duty Bearer	Authority
Secessionist Enclaves	A. The State Actors which exercise Effective Control in the Enclave	Effective Control Test	Russia-Georgia Conflict (2008)
Occupied Territories	A. Occupying Power  and  B. Authorities of the Occupied Territory to the extent that their means allow.	Primary RtoP can be Diffuse	Israel-Gaza Conflict (2008-2009)

<sup>454</sup> UN Human Rights Committee, ‘General Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant’ (n 387), 2 and UN Human Rights Committee, ‘General Comment 23: Article 27- Rights of Minorities’ (n 441), para 6.1.

<sup>455</sup> Rome Statute (n 444) art 5 (1) (a), (b), (c) and art 25.

<sup>456</sup> With respect to human rights, see UN Human Rights Committee, ‘General Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant’ (n 387); *Al Skeini & Others v. The United Kingdom*, 2011 (n 387) para 74 and Giercyz (n 387) 109-113. In relation to humanitarian law, see for e.g. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (n 388).

Contested National Election Results	<p>A. All Sections of the Government in Effective Control Before the National Elections</p> <p>and</p> <p>B. The Opposition Party who may assume Effective Control when the National Election Results are Verified</p>	Primary RtoP can be a Shared Responsibility	Kenya (2008), Zimbabwe (2009)
The Then Existing Government will not Concede Power to the Internationally Recognised Government	<p>A. All Sections of the Government in Effective Control Before the National Elections, including Armed Forces/Groups under their Control</p> <p>and</p> <p>B. All Sections of the Democratically Elected Government</p>	Primary RtoP can be a Diffuse Responsibility, owed by a variety of actors within the State.	Côte d'Ivoire (2010-2011)
The Existing Government faces claims to leadership because it has perpetrated RtoP Crimes	<p>A. The De Jure Government that is in Effective Control</p> <p>and</p> <p>B. The Opposition Government that Claims Recognition as the "Legitimate Authorities"</p> <p>and</p> <p>C. Armed Groups (Non-State Actors)</p>	<p>Primary RtoP can be Owed Concurrently, owed by both the "De Jure" and "De Facto" Government;</p> <p>Non-State Actors can Bear Primary RtoP to some extent, not least with respect to refraining from perpetrating RtoP crimes;</p> <p>The primary RtoP Bearer Concept can Indirectly Relate to Third State Governmental Recognition;</p> <p>Primary RtoP Reinforces the Link Between Protection and Recognition developed in the Context of State Recognition and the Field of Minority Protection.</p>	<p>Libya (2011)</p> <p>Syria (2011-to present day)</p>

The table illustrates that some gaps in practice remain, such as who would bear primary RtoP in secessionist enclaves without *an Occupying Power*. Practical constraints would undermine the viability of recognising the enclave's de facto authorities as the bearer. The non-State

status of the territory could undermine the authorities' ability to implement key primary RtoP measures, such as the ratification of human rights treaties.<sup>457</sup> Third States may be reluctant to provide assistance in order to help the authorities to build the capacity to fulfil primary RtoP, apprehending that engagement with the authorities confers legitimacy upon them. Those States who leave government recognition to be inferred from their 'dealings'<sup>458</sup> may apprehend that engaging with the authorities could be construed as government recognition.<sup>459</sup> Furthermore, providing assistance to the authorities contradicts that the field of minority protection discourages providing assistance to 'political parties and movements abroad'<sup>460</sup> because this undermines the sovereignty and territorial integrity of the sovereign State in which these movements are located. Perhaps most significantly, this approach could undermine the persuasive policy rationale inherent in a State-centric primary RtoP bearer concept. Again, we can draw by analogy on minority protection. No *right to* autonomy has been formulated because there is an apprehension that this could 'spiral'<sup>461</sup> toward secessionist claims.<sup>462</sup> Recognising the de facto authorities of secessionist enclaves as primary RtoP bearers which can be assisted by the international community would suggest that RtoP can sometimes add legitimacy to secessionist movements. These tensions may have influenced responses to the Russia-Georgia conflict. Whilst Georgia<sup>463</sup> reiterated its offer for South Ossetia to become an autonomous region which 'shared sovereignty'<sup>464</sup> with

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<sup>457</sup> UNSG Report 2009, Implementing RtoP (n 331), 11. See further, A Yannis, 'The Concept of Suspended Sovereignty in International Law and its Implications in International Politics' (2002) 13 (5) EJIL 1037 and P Kolsto, 'Living with Non-Recognition: State and Nation Building in South Caucasian Quasi-States (2008) 60 (3) Europe-Asia Studies 483.

<sup>458</sup> Warbrick (n 429), 256.

<sup>459</sup> Reservations may also arise because of the fact that (i) recognition of a "government" can have evidential value in assessing whether the Montevideo criteria for statehood are met; and/or (ii) conducting relations with States might suggest that the territory meets the statehood criterion of capacity of entering into relations with States.

<sup>460</sup> 'States may provide support to cultural, religious or other non-governmental organisations respecting the laws and with explicit or implied consent of the country in which they are registered or operating. However, States should refrain from financing political parties of an ethnic or religious character in a foreign country, as this may have destabilizing effects and undermine good inter-State relations'. OSCE: High Commissioner for National Minorities, *The Bolzano/Bozen Recommendations* (n 391), 7, para 13.

<sup>461</sup> D Wippman, 'The Evolution and Implementation of Minority Rights' (1997-1998) 66 Fordham L. Rev 597, 624.

<sup>462</sup> See CSCE, 'Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE' (adopted 29 June 1990) para 35 <<http://www.osce.org/odihr/elections/14304>> accessed 12 November 2012. For a good summation of the policy fears surrounding the establishment of autonomous arrangements, see especially L Thio, 'Developing a "Peace and Security" Approach to Minorities Problems' (2003) 52 (1) ICLQ 115, 119. See further, Wippman, *ibid*, 624; J. Jackson Preece, 'Minority Rights in Europe: From Westphalia to Helsinki' (1997) 23 Review of International Studies 75, 88; On the way in which the fear of, and claims to, secession can negatively impact upon the development of a robust and effective minority protection regime in general, see Human Rights Commission, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities' (10 August 1993) UN Doc E/CN.4/Sub.2/1993/34. (Human Rights Commission, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities').

<sup>463</sup> Statement of the Representative of Georgia to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc S/PV. 5951.

<sup>464</sup> Statement of the Representative of Georgia to the UNSC, *ibid*.

Georgia, at no point did the UNSC refer to the authorities of the enclave, far less recognise that they owed any protective responsibility. Instead, the primary focus was engaging with the sovereign State in which the enclave is located,<sup>465</sup> qualifying all references to the territory as ‘South Ossetia, Georgia’<sup>466</sup>/‘the South Ossetia region of Georgia’.<sup>467</sup>

The emphasis on Georgia’s sovereignty by members of the UNSC raises the possibility that the requisite territorial relationship between bearer and beneficiary could be determined on the basis of the internationally recognised territorial borders of States. Should the primary RtoP bearer of a secessionist enclave therefore be recognised as the national authorities of the sovereign State in which it is located? The Russia-Georgia conflict highlights that one impediment to this approach is that the national authorities of a sovereign State do not always have effective control over a secessionist enclave located in its territory,<sup>468</sup> undermining its capacity to practically implement primary RtoP. However, practice suggests that a sovereign State’s lack of effective control over newly established secessionist enclaves, or those in the process of being established, could be remedied in one of two ways. First, the UNSG’s 2009 RtoP provides that if a State cannot fulfil primary RtoP ‘because of capacity deficits or lack of territorial control’<sup>469</sup> then ‘the international community should be prepared to support and assist the State in meeting this core responsibility’.<sup>470</sup> Thus, if the national authorities of a sovereign State are considered appropriate primary RtoP bearers, secondary RtoP’s assistance pillar may be applied to help the State overcome a lack of effective control. Second, the responses to the declaration of Northern Mali as the new “State of Azawad”<sup>471</sup> can be drawn upon. The request of the Economic Community of West African

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<sup>465</sup> See UNSC Meeting Record, UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5952; UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5951; UNSC Verbatim Record (10 August 2008) UN Doc S/PV.5953; UNSC Verbatim Record (19 August 2008) UN Doc S/PV.5961 and UNSC Verbatim Record (28 August 2008) UN Doc S/PV.5969.

<sup>466</sup> See e.g. Statements of the Representatives of *China, Indonesia and Belgium* to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc. S/PV.5952.

<sup>467</sup> See e.g. Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5952.

<sup>468</sup> See for example Georgia’s statement that it does not exercise effective control in South Ossetia, *Application Instituting Proceedings, Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, 12 August 2008 (n 375) and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia vs. Russian Federation*, 15 October 2008 (n 375).

<sup>469</sup> UNSG Report 2009, Implementing RtoP (n 331), 10.

<sup>470</sup> UNSG Report 2009, Implementing RtoP, *ibid*.

<sup>471</sup> Following a governmental coup, the Tuareg affiliated rebels used force to push out the national military and, ultimately, declared Northern Mali to be the new State of Azawad, which is to be ruled under extreme notions of Islamic Sharia law. For the rebel’s declaration of independence, see Mouvement National de Liberation de l’Azawad, ‘Déclaration d’Indépendance de l’Azawad’ (*Mouvement National de Liberation de l’Azawad*, 6 April 2012 (*in French*) para 5 <<http://www.mnlamov.net/component/content/article/169-declaration-dindependance-de-lazawad.html>> accessed 6 July 2012 (Mouvement National de Liberation de l’Azawad, ‘Déclaration d’Indépendance de l’Azawad’). On the situation in Mali more generally, including the RtoP-type crimes being committed there, see Amnesty International, ‘Mali’s Worst Human Rights Situation in Fifty Years’ (*Amnesty International*, 16 May 2012) <<http://www.amnesty.org/en/news/mali-s-worst-human-rights-situation-fifty-years-2012-05-15>> accessed 6 July 2012; Amnesty International, ‘Mali: Five Months of Crisis Armed Rebellion and Military Coup’ (Amnesty International Publications, London 2012) <<http://www.amnesty.org/en/library/asset/AFR37/001/2012/en/f93ab197-dd94-45b5-8e42-a3375c7747c4/af370012012en.pdf>> accessed 6 July 2012 and A M Slaughter, ‘Syrian Intervention is

States [ECOWAS] for UNSC authority to use armed force in order to restore Mali's sovereignty and territorial integrity<sup>472</sup> raises the possibility of using non-peaceful responsive measures in order to (i) restore the territorial integrity of the State in which the enclave is located; and (ii) facilitate the national authorities of the sovereign State to implement primary RtoP throughout the territory.<sup>473</sup>

The ambiguity over who bears primary RtoP in certain factual contexts illustrates that there is a need for relevant actors, like States and the UNSG, to begin a discussion on these more nuanced aspects of the RtoP framework which, notably, some Representatives' have already raised concerns about. Whilst Syria 'took issue'<sup>474</sup> with the UNSG's 2009 RtoP Report's 'failure to refer to the need for due protection for populations under foreign occupation',<sup>475</sup> the Representative of the Occupied Palestinian Territories argued that:

'[D]espite the recognition that all populations are entitled to such protection, we find that relevant literature on the issue, including the Secretary-General's important reports, to be selective, focusing on some situations while ignoring others'.<sup>476</sup>

The statement alludes to the need for further clarification of the role of the RtoP framework in non-traditional "State" contexts, and particularly situations of Occupation, in order to overcome the implication that RtoP may be invoked selectively.<sup>477</sup> Beginning this discussion may be difficult. Despite the fact that Occupying Powers are the established duty bearers humanitarian and human rights law in the territories they occupy, only two States (Bangladesh<sup>478</sup> and Swaziland<sup>479</sup>) have so far suggested that this means the Occupying Power

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Justifiable, and Just' *The Washington Post* (Washington D.C, 8 June 2012) <[http://www.washingtonpost.com/opinions/syrian-intervention-is-justifiable-and-just/2012/06/08/gJQARHGjOV\\_story.html](http://www.washingtonpost.com/opinions/syrian-intervention-is-justifiable-and-just/2012/06/08/gJQARHGjOV_story.html)> accessed 6 July 2012.

<sup>472</sup> UN News, 'Security Council Examining Request for UN Mandate for African Troops in Mali' (18 June 2012) <<http://www.un.org/apps/news/story.asp?NewsID=42266&Cr=+mali+&Cr1=>> accessed 6 July 2012. (UN News, 'Security Council Examining Request for UN Mandate for African Troops in Mali').

<sup>473</sup> UN News, 'Security Council Examining Request for UN Mandate for African Troops in Mali', *ibid*.

<sup>474</sup> Statement of the Representative of the *Syrian Arab Republic* to the UNGA, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105.

<sup>475</sup> Statement of the Representative of the *Syrian Arab Republic* to the UNGA, *ibid*.

<sup>476</sup> Statement of the *Permanent Observer of the Occupied Palestinian Territories* to the UNGA in UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (28 July 2009) UN Doc GA/10850 <<http://www.un.org/News/Press/docs/2009/ga10850.doc.htm>> accessed 2 January 2012. (UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate').

<sup>477</sup> The risk of selectivity has been raised by States like Egypt and Venezuela. Statement of the Representative of *Egypt* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1) ['[s]ome seek to apply' RtoP 'to specific countries, while bypassing others toiling under brutal occupation and confronting ferocious aggression without any international force to protect them']; Statement of the Representative of *Venezuela* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1) ['powerful countries are manipulating the concept of the responsibility to protect, when they are seeking solely to impose their strategic interests on the world'].

<sup>478</sup> Statement of the Representative of *Bangladesh* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1).

<sup>479</sup> Statement of the Representative of *Swaziland* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

should also bear primary RtoP. Whilst it is unclear why relevant actors have largely avoided discussing this issue, wider RtoP practice suggests that it may be being evaded for policy reasons. A good example is the US<sup>480</sup> vote against the UN Human Rights Council's [UNHRC] adoption of the Goldstone Report on the Israel-Gaza conflict. The US did not explicitly object to the suggestion that Israel owed primary RtoP to the Gaza population. Nevertheless, it is arguable that the US was at least partly apprehensive over the implications of voting in favour of a Report which suggested this.<sup>481</sup> Acknowledging that Occupying Powers bear primary RtoP is somewhat more significant than recognising that they must adhere to humanitarian law in the territory. The Outcome Document explicitly associates a failure to fulfil primary RtoP with the activation of secondary RtoP's non-peaceful responsive component,<sup>482</sup> thereby paving the way for armed force to be used against the State which is manifestly failing to fulfil primary RtoP. Thus, primary RtoP bearers can be the subject of more coercive consequences for violating primary RtoP than they can for violating human rights and humanitarian obligations per se.

A meaningful debate should also be held regarding the approaches that should be taken to the identification, and external recognition, of the primary RtoP bearer in cases involving competing claims for recognition as "national authorities". Present guidance affirms only that States bear primary RtoP,<sup>483</sup> leaving unanswered who should be considered to be the "national authorities" in cases involving competing claims to national leadership. Similarly, it remains unclear (i) whether third States should take a position on who are the "national authorities" of a State, including in the context of their recognition of new governments; and (ii) whether it is appropriate to recognise, even implicitly, that primary RtoP is held concurrently by two "governments" within one State. Beginning a discussion on this matter will be controversial because it requires discussions on the RtoP framework to delve into whether externally influenced regime change is an acceptable consequence of national authorities' manifest failure to protect their populations.<sup>484</sup> Hannum<sup>485</sup> eloquently summates the significance of connecting issues of "recognition" with doctrines which encourage external actors to act to protect populations. He argues that the 2008 recognition of Kosovo's statehood 'confirms the worst fears of those who see theoretically "humanitarian intervention" as a first step to overthrowing governments and breaking up the territorial

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<sup>480</sup> Statement of the *United States* to the UNHRC in UN Press Release, 'Human Rights Council Concludes Debate on Report of High-Level Mission on Situation of Human Rights in Darfur' (16 March 2007) UN Doc HRC/07/13  
<<http://www.unhchr.ch/huricane/hurricane.nsf/view01/1215DB0D2AE13E5CC12572A30079E53B?opendocument>> accessed 11 May 2011.

<sup>481</sup> UNHRC, 'Report of the UN Fact Finding Mission on the Gaza Conflict' (n 359), 520.

<sup>482</sup> Outcome Document (n 333), para 139.

<sup>483</sup> UNSG Report 2009, Implementing RtoP (n 331), 8.

<sup>484</sup> The interplay between secondary RtoP's discharge and regime change is discussed at length in chapter five.

<sup>485</sup> H Hannum, 'The Responsibility to Protect: Paradigm or Pastiche?' (2009) 60 (2) NILQ 135.

integrity and independence that many States won only a few decades ago'.<sup>486</sup> Admittedly, assessing whether third States should recognise a new government in order to ensure populations protection from RtoP crimes differs from discussing whether a new State should be recognised in order to achieve this (e.g. Kosovo). However, this writer would suggest that the assessment could be perhaps even more controversial because the case studies of Libya, Syria and the Côte d'Ivoire raise the possibility that, in some RtoP cases, issues of external governmental recognition and/or withdrawal of recognition may emerge outside the context of armed force.<sup>487</sup>

## 2 The Concept of the Secondary RtoP "Bearer"

Examination of State views suggests that there is a general consensus regarding which actors constitute members of the "international community". Reference has been made to the UNGA,<sup>488</sup> UNSC,<sup>489</sup> UNHRC,<sup>490</sup> regional organisations,<sup>491</sup> and the International Criminal Court [ICC].<sup>492</sup> Furthermore, the role of fact-finding missions,<sup>493</sup> international commissions

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<sup>486</sup> Hannum, *ibid*, 143.

<sup>487</sup> Chapter five discusses the significance of regime change arising in advance of the use of armed force in more depth.

<sup>488</sup> This includes, Statements of the Representatives of *Japan, Switzerland, Singapore, Cameroon* and *Chile* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statements of the Representatives of *Iceland, Benin*, to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100]; Statement of the Representative of *Egypt (on behalf of the Non-Aligned Movement)* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97; Statements of the Representatives of *Lesotho* and *Azerbaijan* to the UNGA in UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (n 475).

<sup>489</sup> See particularly, Statements of the Representatives of *Cameroon* and *Benin* to the UNGA, *ibid*; Statement of the Representative of *Norway* to the UNGA in UN Press Release, 'More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (24 July 2009) UN Doc GA/10849 <<http://www.un.org/News/Press/docs/2009/ga10849.doc.htm>> accessed 2 January 2012 (UN Press Release, 'More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect'); Statements of the Representatives of *South Africa* and *Pakistan* to the UNGA, UNGA Meeting Record General Assembly (24 July 2009) UN Doc A/63/PV.98; Statement of the Representative of *Azerbaijan* to the UNGA, *ibid*; Statement of the Representative of *Brazil* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

<sup>490</sup> See e.g. for Statement of the Representative of *Japan* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statement of the Representative of *Norway* to the UNGA, *ibid*; Statement of the Representative of *Slovakia* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc. A/63/PV.100 and Statement of the Representative of *Pakistan* to the UNGA, *ibid*.

<sup>491</sup> For e.g. Statements of the Representatives of *Algeria, Chile, Colombia, Ghana* and *Nigeria* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98. Further State views affirming regional organisations as members of the international community are detailed in see Annex II (A) (d).

<sup>492</sup> For e.g. Statement of the Representative of *Switzerland* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statements of the Representatives of *Croatia* and *Bolivia* to the UNGA in UN Press Release, 'More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (n 489); Statement of the Representative of *France* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

<sup>493</sup> These include UNHRC, 'Report of the UN Fact-Finding Mission on the Gaza Conflict' (n 359) and UNHRC, 'Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic' (15 September 2011) UN Doc A/HRC/18/53. (UNHRC, 'Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic').

of inquiry<sup>494</sup> and UN observer missions<sup>495</sup> in practice to date suggests that there is a general acceptance that a number of other actors can be called upon to help protect populations from RtoP crimes and, therefore, to discharge secondary RtoP on behalf of the “international community”. The fact that various actors are understood to be members of the “international community” suggests that the concept can be understood in an RtoP context to be *heterogeneous*. Nevertheless, there is the question of whether it then follows that each of these actors *bear a direct responsibility* to protect populations? Is the “international community” used to delineate the *actual bearer* of secondary RtoP or simply as shorthand for the *range of actors* who can have a role in protecting populations from RtoP crimes? These questions merit further reflection.

## 2.1 A Direct Responsibility?

To determine whether those actors who are considered to be members of the “international community” *bear* secondary RtoP as a responsibility in its own right, consideration can be given to two of the actors which the Outcome Document explicitly refers to (i) the UNSC;<sup>496</sup> and (ii) regional organisations.<sup>497</sup>

### 2.1.1 The UNSC: Bearer or Actor?

The majority of State views,<sup>498</sup> including those of three of the P5,<sup>499</sup> suggest that the UNSC

<sup>494</sup> UNHRC, ‘Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya’ (1 June 2011) UN Doc A/HRC/17/44. (UNHRC, ‘Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya’).

<sup>495</sup> UNSC Res 2043 (2012) UN Doc S/RES/2043, paras 7 and 8.

<sup>496</sup> Outcome Document (n 333), para 139.

<sup>497</sup> Outcome Document, *ibid*.

<sup>498</sup> Statements of the Representatives of *China* and *Argentina* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc. S/PV/5476; Statement of the Representative of *Japan* to the UNSC, UNSC Verbatim Record (December 2006) UN Doc S/PV/5577; Statement of the Representative of the *Philippines* to the UNSC, UNSC Verbatim Record (June 2005) UN Doc S/PV/5209; Statements of the Representatives of *Jamaica (on behalf of the Caribbean Community)*, *Macedonia* and *Swaziland* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statements of the Representatives of *Colombia*, *South Africa*, *China*, *Nigeria* and *Japan* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc. A/63/PV.98; Statement of the Representative of *New Zealand* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97; Statements of the Representatives of *Lesotho*, *Hungary* and *Qatar* to the UNGA in UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 489); Statements of the Representatives of *Holy See* and *Azerbaijan* to the UNGA in UN Press Release, ‘Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate’ (n 475).

<sup>499</sup> China, France and the Russian Federation. Statement of the Representative of *China* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 [‘When the occurrence of such a crisis calls for the UN to respond, the Security Council has a role to play. But the Council must make its judgment and decisions in light of



does not bear secondary RtoP as a distinct responsibility but, rather, that the UNSC *can be utilised to discharge* secondary RtoP. Thus, the majority of States seem to consider that the UNSC is an actor in the RtoP framework, not a direct bearer of secondary RtoP. Significantly, the Outcome Document and relevant practice suggest that whether the UNSC is an actor in a specific case depends upon certain variables.

The Outcome Document statement that the international community is ‘prepared’<sup>500</sup> to undertake a ‘timely and decisive’<sup>501</sup> response ‘through the UNSC, in accordance with the Charter, including Chapter VII’<sup>502</sup> calls to mind that the UN Charter provides for Chapter VII enforcement measures to be applied to address threats to international peace and security.<sup>503</sup> Similarly, the explicit reference to Chapter VI of the UN Charter recalls the fact that the UNSC can be called upon for the pacific settlement of disputes, not least by States referring a situation for inclusion on the UNSC’s agenda.<sup>504</sup> Accordingly, for the UNSC to discharge peaceful and non-peaceful responsive secondary RtoP measures,<sup>505</sup> the RtoP case at issue must first either (i) be referred for inclusion on the UNSC’s agenda,<sup>506</sup> or (ii) be deemed to represent a threat to international peace and security.<sup>507</sup>

Over the last two decades, an expanded notion of what amounts to a threat to international peace and security has developed, specifically that threats can arise from events inside a State, such as the perpetration of the mass atrocity crimes to which RtoP relates.<sup>508</sup> However, the Outcome Document also provides that secondary RtoP’s discharge ‘through

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specific circumstances, and must act prudently. It must be pointed out that the responsibility of the Council entrusted by the UN Charter is the maintenance of international peace and security. The prerequisite for its taking action is the existence of “any threat to the peace, breach of the peace, or act of aggression”. The Council must consider “RtoP” in the broader context of maintaining international peace and security, and must guard against abusing the concept’]; Statement of the Representative of *France* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 [it ‘is essential’ to maintain the UNSC’s role to that ‘defined by the Charter’] and Statement of the Representative of the *Russian Federation* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 [‘any intervention by the international community should be of an exceptional nature and fully compliant with international law, in particular the United Nations Charter’].

<sup>500</sup> Outcome Document (n 333), para 139.

<sup>501</sup> Outcome Document, *ibid.*

<sup>502</sup> Outcome Document, *ibid.*

<sup>503</sup> United Nations, *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 39. (UN Charter).

<sup>504</sup> Article 34 of Chapter VI mandates the UNSC to consider/investigate any disputes. Article 35 (1)-(2) regards a referral of a situation to the UNSC by a Member State or Non-Member State. See UN Charter, *ibid.*, arts 34 and 35 (1)-(2).

<sup>505</sup> Outcome Document (n 333), para 139.

<sup>506</sup> UN Charter (n 503) art 35 (1) (2).

<sup>507</sup> As the former President of the UNGA advised, no Charter provision concerning the Security Council ‘would cover responsibility to protect unless the situation was a threat to international peace and security’. Office of the President of the General Assembly, ‘Concept Note on Responsibility to Protect Populations from Genocide, War Crimes, Crimes Against Humanity and Ethnic Cleansing’ (2009), 2

<<http://www.un.org/ga/president/63/interactive/protect/conceptnote.pdf>> accessed 12 November 2012.

<sup>508</sup> On the development of an expanded notion of threats to international peace and security and its bearing on secondary RtoP’s discharge see e.g. A Peters, ‘Humanity as the Alpha and Omega of Sovereignty’ (2009) 20 (3) EJIL 513, 538-539; A M Slaughter, ‘Security, Solidarity and Sovereignty: The Grand Themes of UN Reform’ (2005) 99 (3) AJIL (2005) 619, 626-627; Payandeh (n 368), 494-497 and, more generally, J Schott, ‘Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency’ (2007) 6 (1) Nw. Univ. J. Int’l Hum Rts. 24.

the UNSC<sup>509</sup> will be on a ‘case-by-case basis’.<sup>510</sup> This reinforces Article 39 of the UN Charter which provides that the UNSC has discretion regarding whether a situation represents a threat to international peace and security.<sup>511</sup> For the UNSC to become a non-peaceful responsive secondary RtoP actor, the UNSC must first agree that a situation does constitute a threat to international peace and security. This agreement has not always been reached in the cases in which RtoP has been invoked to date. For instance, China asserted that it is ‘preposterous’<sup>512</sup> to deem ‘human rights, HIV and refugee matters’<sup>513</sup> in Burma as threats to international peace and security which could activate the UNSC’s peace and security mandate.<sup>514</sup> Furthermore, both Russia and China are argued to consider that the gross violations of human rights in Syria are ‘*insufficiently egregious*’<sup>515</sup> to constitute threats to international peace and security.<sup>516</sup>

### 2.1.2 Regional Organisations: Bearer or Actor?

The Outcome Document’s reference to Chapter VIII of the Charter<sup>517</sup> indicates that regional organisations may act pacifically, whilst its explicit reference to responsive measures being undertaken ‘in cooperation with relevant regional organisations, as appropriate’<sup>518</sup> suggests that they can also undertake non-peaceful secondary RtoP responses. However, there is limited evidence that regional organisations bear secondary RtoP as a responsibility in its own right. Rather, the aforementioned Outcome Document provisions seem to simply reinforce the UN Charter provision for regional organisations to discharge peaceful measures<sup>519</sup> and, furthermore, to address threats to international peace and security through non-peaceful measures with the prior authorisation of the UNSC.<sup>520</sup> This suggests that regional organisations can discharge their existing mandates in RtoP cases and are therefore

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<sup>509</sup> Outcome Document (n 333), para 139.

<sup>510</sup> Outcome Document, *ibid.*

<sup>511</sup> UN Charter (n 503) art 39.

<sup>512</sup> Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (15 September 2006) UN Doc S/PV.5526. Contrast this view with the United States’ view which reminded the UNSC of the expanded notion of threats to international peace and security that has developed in practice. See Letter of the Representative of the United States to the UNSC President, ‘The Situation in Myanmar’ (1 September 2006) UN Doc S/2006/742 and Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (15 September 2006) UN Doc S/PV.5526.

<sup>513</sup> Statement of the Representative of *China* to the UNSC, *ibid.*

<sup>514</sup> Statement of the Representative of *China* to the UNSC, *ibid.*

<sup>515</sup> Statement of the Representative of the United States to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627, emphasis added. See further, Statements of the Representatives of the *Russian Federation* and *China* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627.

<sup>516</sup> The significance of Russia and China’s standpoints here are discussed in chapter four in the context of secondary RtoP’s activation.

<sup>517</sup> Outcome Document (n 333), para 139.

<sup>518</sup> Outcome Document, *ibid.*

<sup>519</sup> UN Charter (n 503) art 52 (1).

<sup>520</sup> UN Charter, *ibid.*, art 53 (1).

secondary RtoP actors.

Whether regional organisations *do act* in a particular RtoP case appears to depend on three variables. First, the Outcome Document's explicit reference to regional organisations' *co-operation*<sup>521</sup> with the UNSC<sup>522</sup> suggests that, in cases involving the application of non-peaceful responsive measures, they may only become actors when they have received the UNSC's authorisation to do so. Second, only '*relevant* regional organisations'<sup>523</sup> may act in a non-peaceful manner, suggesting that whether regional organisations are non-peaceful secondary RtoP actors is dependent upon the identity of the organisation. Neither State views nor the Outcome Document's drafting history clarify the meaning of '*relevant*'.<sup>524</sup> However, Pattison<sup>525</sup> notes that a regional organisation's *resources* could affect whether it acts in a particular case. For example, he notes that the EU 'lacks the ability to deploy a large-scale force out of the area'.<sup>526</sup> In addition, relevancy may be influenced by whether a regional organisation has committed itself to act in an RtoP-type way and the nature of this commitment.<sup>527</sup> For example, the African Union reserves the right to forcibly respond to RtoP-type cases,<sup>528</sup> whereas the EU committed to supporting 'a strengthened role'<sup>529</sup> for regional organisations 'in the process of enhancing international peace and security'.<sup>530</sup> Whether a regional organisation is considered '*relevant*'<sup>531</sup> may therefore be influenced by its (i) capacity to act in a particular case (e.g. geographically) and the extent to which it is prepared to act (e.g. resources and organisational mandate for the use of armed force). Finally, the Outcome Document provides that such 'co-operation with relevant regional

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<sup>521</sup> Outcome Document (n 333), para 139, emphasis added.

<sup>522</sup> Outcome Document, *ibid*.

<sup>523</sup> Outcome Document, *ibid*, emphasis added.

<sup>524</sup> Outcome Document, *ibid*.

<sup>525</sup> J Pattison, 'Legitimacy and Humanitarian Intervention: Who Should Intervene?' (2008) 12 (3) *Int. J. Hum. Rts.* 395.

<sup>526</sup> Pattison, *ibid*, 409.

<sup>527</sup> For a discussion of the RtoP-type principles included in regional organisations mandates, see C Gray, 'A Crisis of Legitimacy for the UN Collective Security System?' (2007) 56 (1) *I.C.L.Q.* 157, 168, fn 50; V Holt and T Berkman, *The Impossible Mandate? Military Preparedness, The Responsibility to Protect and Modern Peace Operations* (The Henry L. Stimson Centre, Washington D.C 2006) 59-60; A Orford, 'Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect' (2008-2009) 30 *Mich. J. Int'l L.* 981, 1007; E McClean, 'The Responsibility to Protect: The Role of International Human Rights Law' (2008) 13 (1) *Journal of Conflict and Security Law* 123, 138; Peters (n 508), 522; N Wheeler and F Egerton, 'The Responsibility to Protect: 'Precious Commitment' or a Promise Unfulfilled?' (2010) 1 *GRtoP* 114, 543; Bellamy, 'Whither the Responsibility to Protect?' (n 384), 157-162; A Bellamy, 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq' (2005) 19 (2) *Ethics and International Affairs* 31, 35; A De Waal, 'Darfur and the Failure of the Responsibility to Protect' (2007) 83 (6) *Ethics and International Affairs* 1039, 1042 and S Koko, 'Whose Responsibility to Protect? Reflections on the Dynamics of an 'Abandoned Disorder' in Somalia' (2007) 16 (3) *African Security Review* 2, 9.

<sup>528</sup> Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3 art 4 (h).

<sup>529</sup> Council of Europe, 'Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: "The European Consensus"' (22 November 2005) COE Doc. 14820/05, para 37.

<sup>530</sup> Council of Europe, *ibid*.

<sup>531</sup> Outcome Document (n 333), para 139.

organisations'<sup>532</sup> will be undertaken 'as appropriate'.<sup>533</sup> Thus, whether regional organisations are called upon as non-peaceful secondary RtoP actors is context-dependent, not least because their role in a particular RtoP case remains at the discretion of the UNSC.

### 2.1.3 The Secondary RtoP "Bearer" Concept: General Findings

Each of the actors identified as members of the "international community" have, by reason of the nature of their existing mandates, a *vested interest* in protecting populations from RtoP crimes. Table B outlines the range of actors that, due to their vested interest in protecting populations, have been delineated as members of the "international community" in relevant practice and, therefore, as actors who can discharge secondary RtoP. It also outlines the kind of variables that can influence whether a particular actor does act in a certain RtoP case.

Table B: The Secondary RtoP "Bearer" Concept

Examples of Members of the "International Community"	Nature of Role under Secondary RtoP	Actor or Bearer?	Requirements for becoming an Actor	Relevant Extracts of the Outcome Document (2005)
UN Security Council	Responsive:  1. Peaceful Response under Chapter VI;  2. Non-Peaceful Response under Chapter VII.	Actor	1. Peaceful Response:  - Situation has been referred to the Security Council for Inclusion on its Agenda;  2. Non-Peaceful Response:  (a) Security Council Recognise that the Situation represents a Threat to International Peace and Security;  (b) There is Sufficient Political Will to Apply Chapter	1. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, <i>in accordance with Chapters VI and VIII of the Charter</i> , to help to protect populations from' RtoP crimes (para 139, emphasis added);  2. '[W]e are prepared to take collective action, in a timely and decisive manner,

<sup>532</sup> Outcome Document, *ibid.*

<sup>533</sup> Outcome Document, *ibid.*, emphasis added.

			VII Enforcement Measures;  (c) There is Sufficient Political Will among the P5 to Refrain from using the Veto to Prevent Chapter VII Enforcement Measures from being Authorised	<i>through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate' (para 139, emphasis added).</i>
<b>Regional Organisations</b>	Responsive:  1. Peaceful Response under Chapter VIII;  2. Non-Peaceful Response under Chapter VIII.	Actor	1. Peaceful Response:  Political Will and Capacity to Respond;  Invited to Respond by the State at issue or Situation Referred to it by the Security Council  2. Non- Peaceful Response:  (a) Regional Organisation is Authorised by the Security Council to Carry Out Chapter VII Enforcement Measures in Response to a Threat to International Peace and Security (Article 53 (1), UN Charter);  (b) Regional Organisation is "Relevant" i.e. it has the Capacity, Resources and Mandate to Carry Out Security Council Authorised Chapter VII Enforcement Measures.	1. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, <i>in accordance with Chapters VI and VIII of the Charter</i> , to help to protect populations from 'RtoP crimes (para 139, emphasis added);  2. '[W]e are prepared to take collective action, in a timely and decisive manner, <i>through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate' (para 139, emphasis added).</i>

Table B illustrates that the existing mandates of actors legitimates their role in discharging secondary RtoP but also negates the possibility that specific members of the international community *bear* secondary RtoP as a direct responsibility. In this line, some commentators<sup>534</sup> discuss the possibility that providing for the “international community” to discharge secondary RtoP means that it cannot be characterised as a *duty*, not least because a duty should be assigned to a specific bearer and not a range of potential actors.<sup>535</sup> This view seems to presume that the Outcome Document’s references to the “international community” were intended to delineate a concept of the secondary RtoP *bearer*. Orford<sup>536</sup> alludes to a different explanation, arguing that linking secondary RtoP’s discharge to the existing mandates of the “international community’s” members reinforces the UN as the ‘primary authority for exercising jurisdiction in global matters’,<sup>537</sup> particularly situations entailing the mass atrocity crimes RtoP covers<sup>538</sup>. To the present author, this is a more persuasive view. It raises the possibility that the term “international community” was used simply as *shorthand*, an *umbrella term*, for the myriad of actors who, by reason of their existing mandates (i) can have a vested interest in protecting populations from RtoP crimes; and (ii) *should* (not *must*) apply those mandates in order to protect populations from RtoP crimes. Using the “international community” in the sense of an umbrella term overlaps with its usage in wider international instruments, such as those in the context of State responsibility<sup>539</sup> and minority protection.<sup>540</sup> In these contexts, the “international community” is not identified as an independent entity which is to carry out various functions in its own right (i.e. in the sense of a bearer) but, rather, as an entity comprising of various members who hold an interest in the

<sup>534</sup> See especially, L Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’ (2008) 34 *Review of International Studies* 445; S Rosenberg, ‘Responsibility to Protect: A Framework for Prevention’ in Bellamy, Davies and Glanville (n 387), 191; M Kalkman, ‘Responsibility to Protect: A Bow Without an Arrow?’ (2009) 5 *Cambridge Student Law Review* 75; E Strauss, ‘A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect’ Bellamy, Davies and Glanville (n 387), 51-54; P Akhavan, ‘Preventing Genocide: Measuring Success by What Does Not Happen’ (2011) 22 (1) *Crim. L. F.* 1, 13-16; C Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm’ (2007) 101 (1) *AJIL* 99; Payandeh (n 368), 499-501; Peters (n 508), 539 and H Nasu, ‘Operationalising the Responsibility to Protect and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict’ (2009) 14 (2) *Journal of Conflict and Security Law* 209, 216-234. See also J Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (OUP, Oxford 2010) 15-20.

<sup>535</sup> For e.g. Cunliffe argues that ‘not a single formulation of the doctrine to date is able succinctly to express and logically to demonstrate that there is a single, identifiable agent formally obligated to act or intervene in a particular situation’. P Cunliffe (ed), *Critical Perspectives on the Responsibility to Protect: Interrogating Theory and Practice* (Routledge, Abingdon 2011) 55. See also K Tan, ‘The Duty to Protect’ in T Nardin and M Williams (eds), *Humanitarian Intervention* (New York University Press, New York 2006) 95 and J Welsh and M Banda, ‘International Law and the Responsibility to Protect: Clarifying or Expanding States’ Responsibilities’ in Bellamy, Davies and Glanville (n 387), 217-226. Chapter six considers this strand of present literature from the perspective of secondary RtoP’s *character*.

<sup>536</sup> A Orford, *International Authority and the Responsibility to Protect* (CUP, Cambridge 2011).

<sup>537</sup> See generally, Orford, *ibid* and especially at 181-184.

<sup>538</sup> Orford, *ibid*, 181-184.

<sup>539</sup> On the concept in the context of State Responsibility, see generally UN International Law Commission, ‘Special Rapporteur on State Responsibility, James Crawford, Fourth Report on State Responsibility’ (Fifty-Third Session, 2001) UN Doc A/CN.4/517, 14.

<sup>540</sup> For e.g. the “international community” is invoked in OSCE: High Commissioner for National Minorities, *The Bolzano/Bozen Recommendations* (n 391), 10-12.

performance of certain actions by States (e.g. in the State responsibility context, the non-violation of *erga omnes* obligations<sup>541</sup> and, in the minority protection context, in States effective implementation of minority rights<sup>542</sup>).

On the one hand, Syria suggests that an “actors” approach can entail the same disadvantage of a “bearer” approach, specifically by enabling secondary RtoP’s discharge to be impeded by (i) a lack of political will on the part of the “actor” (e.g. the UNSC P5); and (ii) procedural obstacles (e.g. veto). This can encourage States to devise new ways of acting collectively *in* RtoP cases but *outside* of the RtoP framework. When Russia<sup>543</sup> and China’s<sup>544</sup> vetoes inhibited the “international community” from channelling secondary RtoP through the UNSC, it became necessary to initiate action outside of the RtoP framework and the existing mandates to which it relates, not least by constructing a group of States who support more robust international involvement in Syria (the so-called “Friends of Syria” group<sup>545</sup>). Conversely, formulating secondary RtoP around a range of actors who can and should discharge can increase its *flexibility*. For example, the explicit reference to peaceful means being undertaken through Chapter VI and VIII of the UN Charter enables regional organisations to ensure that no vacuum in protection arises if the UNSC fails to accept a situation on its agenda.<sup>546</sup> To this effect, the references to Chapter VI and VIII recognise that Member States, the UNSC and regional organisations can all act in order to ensure the application of appropriate peaceful means to ‘help to protect populations’.<sup>547</sup> Flexibility is also strengthened by the fact that the Outcome Document does not exclude other organs from discharging secondary RtoP when a situation has, for example, activated the UNSC’s mandate. For instance, the fact that the situation in Syria is being managed by the UNSC has not excluded Member States from acting through the UNGA or UNHRC in order to help to protect the Syrian population from RtoP crimes.<sup>548</sup>

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<sup>541</sup> On the way in which *erga omnes* obligations interconnect with the RtoP framework and legitimate the role of third States under secondary RtoP, see especially Peters (n 508), 526 and 540.

<sup>542</sup> OSCE: High Commissioner for National Minorities, *The Bolzano/Bozen Recommendations* (n 391), 10-11.

<sup>543</sup> Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627. See further, Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711 [vetoing Draft UNSC Resolution, 4 February 2012 (n 416)].

<sup>544</sup> Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627. See also, Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711 [vetoing Draft UNSC Resolution, 4 February 2012, *ibid*].

<sup>545</sup> See e.g. UK FCO, ‘Foreign Secretary: “We Have to Intensify Pressure on Syria”’ (n 422).

<sup>546</sup> Outcome Document (n 333), para 139.

<sup>547</sup> Outcome Document, *ibid*.

<sup>548</sup> Chapter five examines the significance of this practice in terms of the scope of secondary RtoP and chapter six considers the importance of this practice in terms of secondary RtoP’s legal status and development. For examples of this practice, see e.g. ‘Human Rights Council Requests Commission of Inquiry to Conduct a Special Inquiry in the Events in El Houleh’, 1 June 2012 (n 438); UN Press Release, ‘Third Committee Approves Resolution Condemning Human Rights Violations in Syria’ (22 November 2011) UN Doc GA/SHC/4033 <<http://www.un.org/News/Press/docs/2011/gashc4033.doc.htm>> accessed 7 August 2012; UNGA Third Committee Voting Record, ‘Situation of Human Rights in the Syrian Arab Republic’ (22 November 2011) UN Doc A/C.3/66/L.57/Rev.1; UN Press Release, ‘General Assembly Adopts more than Sixty Resolutions Recommended by Third Committee Including Text Condemning Grave, Systematic Human Rights Violations in

An “actors” approach also helps to ensure that secondary RtoP’s discharge is pursuant to existing mandates and obligations. Providing that the “international community” were the bearers of secondary RtoP could have enabled it to be discharged by an indefinite range of actors claiming to be members of the “international community”. For example, groups of third States may have used their membership in the “international community” as a pretext for taking collective diplomatic action similar to the Friends of Syria meetings. If a group of States from a particular geopolitical bloc were able to legitimately channel the international community concept through such action, apprehensions that secondary RtoP will become a vehicle for the imposition of Western values (e.g. Liberal Peace theories<sup>549</sup>) would gain strength. Thus, an “actors” approach helps to maintain the ground gained at the World Summit between balancing non-interference and non-indifference (i.e. that protective action *should be* undertaken through the range of measures provided for in the existing mandates of regional and/or global organisations).<sup>550</sup>

### 3 The Beneficiary Concept

In the RtoP Reports preceding the Outcome Document, the RtoP beneficiary concept varied between ‘groups’,<sup>551</sup> ‘civilians’,<sup>552</sup> ‘citizens’,<sup>553</sup> ‘people’<sup>554</sup> and ‘civilian populations’.<sup>555</sup> This inconsistent treatment of the beneficiary concept seemed to be remedied when, during the drafting of the Outcome Document,<sup>556</sup> States narrowed the concept to a choice between “civilians” or “populations”. One group<sup>557</sup> favoured a “civilians” approach, calling for the

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Syria’ (19 December 2011) UN Doc GA/11198 <<http://www.un.org/News/Press/docs/2011/ga11198.doc.htm>> accessed 5 January 2012; UNGA Res 66/176, ‘Situation of Human Rights in the Syrian Arab Republic’ (23 February 2012) UN Doc A/RES/66/176 and UNGA Res 66/253, ‘The Situation in the Syrian Arab Republic’ (21 February 2012) UN Doc A/RES/66/253 and UN Press Release, ‘General Assembly, in Resolution, Demands All in Syria ‘Immediately and Visibly’ Commit to Ending Violence that Secretary-General says is Ripping Country Apart’ (3 August 2012) UN Doc GA/11266 <<http://www.un.org/News/Press/docs/2012/ga11266.doc.htm>> accessed 8 August 2012.

<sup>549</sup> See especially, D Chandler, ‘The Responsibility to Protect? Imposing the “Liberal Peace”’ (2004) 11 (1) International Peacekeeping 59 and N Oman, ‘The ‘Responsibility to Prevent’: A Remit for Intervention?’ (2009) 22 Canadian Journal of Law & Jurisprudence 355, 367-380. See further, Nasu (n 534), 231.

<sup>550</sup> D Capie, ‘The Responsibility to Protect Norm in Southeast Asia: Framing, Resistance and the Localisation Myth’ (2012) 25 (1) Pacific Review 75, 88.

<sup>551</sup> ICISS Report (n 331), 75 [‘large groups’] and 24 [‘vulnerable groups’].

<sup>552</sup> UNSG Report, ‘In Larger Freedom’ (n 331), 35 and HLP Report (n 331), 73.

<sup>553</sup> HLP Report, *ibid* 66 [‘own citizens’] and ICISS Report (n 331), 13.

<sup>554</sup> HLP Report, *ibid*, 1, 9, 31, 61 [‘own peoples’] and ICISS Report, *ibid* 17.

<sup>555</sup> UNSG Report, ‘In Larger Freedom’ (n 331), 35.

<sup>556</sup> Outcome Document (n 333), paras 138-139.

<sup>557</sup> See the summary of the 2005 Statements of the Representatives of *Cuba, Egypt, Russian Federation* and *Syria* to the UNGA provided by World Federalist Movement, ‘State-by-State Positions on the Responsibility to Protect’ (11 August 2005) <<http://www.responsibilitytoprotect.org/index.php/document-archive/civil-society?view=fjrelated&id=2411>> accessed 11 January 2011 (WFM Report). See also, Statement of the Representative of *Pakistan* to the UNGA, ‘Informal Meeting of the Plenary on the High Level Plenary Meeting of



section on RtoP to be re-entitled “The Responsibility to Protect Civilian Populations”.<sup>558</sup> This call was opposed by Rwanda<sup>559</sup> and Sweden<sup>560</sup> who argued that all members of States “populations” should be beneficiaries, irrespective of whether they have status as “civilians”.<sup>561</sup> This argument succeeded, the final text of the Outcome Document clearly providing that “populations” benefit from RtoP.<sup>562</sup> The rationale for formulating “populations” as RtoP beneficiaries therefore seems straightforward. A “populations” beneficiary concept is all-inclusive, not requiring its members to have a particular status or identity (e.g. as “civilians”). This rationale may explain why subsequent international and regional documents referring to RtoP have affirmed that “populations” are RtoP beneficiaries.<sup>563</sup> Nevertheless, a “populations” beneficiary concept has not been consistently upheld in State views on RtoP or international practice. The alternative beneficiary concepts used, and the potential significance thereof, merit further consideration.

### 3.1 State Practice

Examination of two hundred and fifty seven State views<sup>564</sup> on RtoP illustrates that only thirty per cent of statements<sup>565</sup> affirm “populations” as beneficiaries. In contrast, one hundred and

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the General Assembly of September 2005’ (June 2005)

<[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 11 January 2011.

<sup>558</sup> Or, alternatively, “The Protection of Civilians”. Statement of the Representative of *Pakistan* to the UNGA, *ibid*.

<sup>559</sup> Statement of the Representative of *Rwanda* to the UNGA in WFM Report (n 557). See also Statement of the Representative of *Rwanda* to the UNGA ‘Proposed RtoP Language for September Outcome Document’ (29 July 2005) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 11 January 2011. (Rwanda, ‘Proposed RtoP Language for September Outcome Document’).

<sup>560</sup> Statement of the Representative of *Sweden* to the UNGA in WFM Report, *ibid*.

<sup>561</sup> For example, Sweden argued that ‘RtoP should address the population as a whole, not just have text on the civilian population’. Statement of the Representative of *Sweden* to the UNGA, *ibid*.

<sup>562</sup> Outcome Document (n 333), paras 138-39.

<sup>563</sup> See especially, UNSG Report 2009, Implementing RtoP (n 331), para 8; UNSC Res 1674 (2006) UN Doc S/RES/1674, preambular para 4 (UNSC Res 1674); UNHRC, ‘Prevention of Genocide’ (25 March 2008) UN Doc A/HRC/7/L.26, 4 (UNHRC, ‘Prevention of Genocide’); African Commission on Human and Peoples’ Rights Res ‘Strengthening the Responsibility to Protect in Africa’ (28 November 2007) AU Doc. ACHPR/Res.117 (XXXXII) 07, para 5 (African Commission on Human and Peoples’ Rights Res ‘Strengthening the Responsibility to Protect in Africa’); European Parliament Res ‘The Situation in Darfur’ (28 September 2006) EP Doc P6\_TA(2006)0387, para E (EP Res ‘The Situation in Darfur’); European Parliament Resolution, ‘The Tragic Situation in Burma’ (22 May 2008) EP Doc. P6\_TA(2008)0231, para 3 (EP Res, ‘The Tragic Situation in Burma’); UNSC Resolution 2014 (21 October 2011) UN Doc S/RES/2014 (UNSC Res 2014), preambular para 5 [regarding Yemen]; UNHRC Res S-16/1 (n 415), para 1; UNHRC Res S-15/1 (n 416), para 2; UNSC Res 1970 (n 414), preambular para 9 and UNSC Res 1973 (n 414), preambular para 4.

<sup>564</sup> State views surveyed for this chapter are detailed in Annex I (a), (b), (c), (d), (e), (f), (g) (i) and (i).

<sup>565</sup> This includes: Statement of the Representative of *Sweden* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.2; Statement of the Representative of *Rwanda* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.4; Statement of the Representative of *Guatemala* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7; Statement of the Representative of the *European Commission* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.8; Statement of the Representative of *Argentina* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5319; Statement of the Representative of *Austria* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476; Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476; Statement of the Representative of *Portugal* to the UNSC, UNSC Verbatim Record

twenty three statements (seventy per cent of statements), delivered by seventy four States globally, delineate RtoP beneficiaries as either ‘civilians’,<sup>566</sup> ‘citizens’<sup>567</sup> or ‘people’.<sup>568</sup> Admittedly, States may have used these terms in their *generic* sense, not intending any significance to be attached thereto. However, examination of State views suggests that at least some States have used the terms in accordance with their legal meaning<sup>569</sup> and, therefore, as *new* RtoP beneficiary concepts. As examples, it is notable that some of the representatives who referred to “civilians” as beneficiaries come from territories which have a national experience of hostilities or conflict. Pertinent examples are Sri Lanka,<sup>570</sup> Sierra Leone<sup>571</sup> and the Occupied Palestinian Territories.<sup>572</sup> A further example is that some of the States who proposed “people” as beneficiaries also expressly considered the way in which RtoP interconnects with a people’s right to self-determination. Iceland<sup>573</sup> is a useful example. Referring to “people” as RtoP beneficiaries, Iceland argued that the RtoP framework formulated at the World Summit would contribute to ‘redressing the imbalance’<sup>574</sup> which exists in relation to ‘the key commitments to the peoples enshrined in the Charter’.<sup>575</sup> Notably, the principles and purposes of the UN Charter give particular consideration to the

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(November 2007) UN Doc S/PV/5781(Res.1) . All State views referring to “populations” are detailed in Annex II (B) (a).

<sup>566</sup> This includes: Statement of the Representative of *Armenia* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7; Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (June 2005) UN Doc S/PV/5209; Statement of the Representative of *Nepal* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5319; Statement of the Representative of *Ghana* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476; Statement of the Representative of *Canada* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statement of the Representative of *Egypt* (on behalf of the Non-Aligned Movement) to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97. All State views referring to “civilians” are detailed in Annex II (B) (b).

<sup>567</sup> This includes: Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5319; Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (November 2007) UN Doc S/PV/578; Statement of the Representative of *Sri Lanka* to the UNSC, UNSC Verbatim Record (December 2009) UN Doc S/PV/6216(Res.1); Statement of the Representative of *Myanmar* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100. All State views referring to “citizens” are detailed in Annex II (B) (c).

<sup>568</sup> This includes: Statements of the Representatives of *Estonia*, *Monaco* and *Iceland* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.6; Statement of the Representative of *Indonesia* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7; Statement of the Representative of *Bangladesh* to the UNSC, UNSC Verbatim Record (January 2009) UN Doc S/PV/6066(Res.1). All State views referring to “peoples” are detailed in Annex II (B) (d).

<sup>569</sup> In international law a distinction is drawn between persons engaged in violence (for example, combatants) and those who are not (civilians). In international law, “people” is used to denote the beneficiaries of the right to self-determination. “Citizens” is typically used to refer to those persons who possess the formal nationality of the State.

<sup>570</sup> Statement of the Representative of *Sri Lanka* to the UNSC, UNSC Verbatim Record (December 2009) UN Doc S/PV/6216(Res.1); Statement of the Representative of *Sri Lanka* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV/100.

<sup>571</sup> Statement of the Representative of *Sierra Leone* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV/100.

<sup>572</sup> Statement of the *Permanent Observer of the Occupied Palestinian Territories* in UN Press Release, ‘Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate’ (n 475).

<sup>573</sup> Statement of the Representative of *Iceland* to the UNGA, UNGA Meeting Record (15 September 2005) UN Doc A/60/PV/6.

<sup>574</sup> Statement of the Representative of *Iceland*, *ibid*.

<sup>575</sup> Statement of the Representative of *Iceland* *ibid*. See also Statement of the Representative of *Poland* to the UNGA, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV/7; Statement of the Representative of *Estonia* to the UNGA, UNGA Meeting Record (15 September 2005) UN Doc A/60/PV/6.

importance of peoples' right to self-determination.<sup>576</sup>

In view of the apparent use of “civilians”, “citizens” and “people” in their legal sense by some States, it is important to consider whether a “civilians”, “citizens” or “people” RtoP beneficiary concept could create conceptual difficulties and/or entail legal and policy implications for the effective implementation of RtoP and existing obligations to which it relates.

### 3.1.1 Implications for the RtoP Framework

A “civilians”, “citizens” or “people” beneficiary concept could entail largely four implications for the RtoP framework.

#### *(i) Persons Protected from RtoP Crimes*

A “civilians”, “citizens” or “people” beneficiary concept could, in practice, serve to exclude certain members of States' populations from being owed protection from war crimes, ethnic cleansing, crimes against humanity and genocide that RtoP was formulated to ensure. “Civilians” and “citizens” are particularly useful illustrations.

A “civilians” approach would exclude those members of a States' population who are actively participating in hostilities (e.g. members of armed groups and the States military). The potential effect of a “civilians” beneficiary concept would therefore be most prominent in cases where RtoP crimes are perpetrated in the midst of armed conflict. Examples of those potentially excluded are the anti-government rebel movements in Libya and Syria, the armed rebel groups in the disputed territories bordering Sudan and South Sudan and the Tamil Tigers in Sri Lanka.<sup>577</sup>

A “citizens” approach would exclude those members of a States' population who ‘do not usually acquire the citizenship of the State in which they temporarily establish themselves’.<sup>578</sup> This could preclude so-called ‘new minorities’,<sup>579</sup> such as refugees and migrant workers,<sup>580</sup> from benefiting from the protection provided under primary and secondary RtoP. Some support for this risk is provided by the fact that a mere handful of

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<sup>576</sup> UN Charter (n 503) art 1 (2).

<sup>577</sup> For a review of the possibility that the mass atrocity crimes that RtoP covers have been perpetrated in Sri Lanka, including against Tamil Tigers placed hors de combat, see D Kingsbury, *Sri Lanka and the Responsibility to Protect: Politics, Ethnicity and Genocide* (Routledge, Abingdon 2012) 82-93, especially 87-88.

<sup>578</sup> UNCHR (Sub-Commission), ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities’ (1979) UN Doc E/CN.4/Sub.2/384/Rev.1, 10. (UNCHR (Sub-Commission), ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities’).

<sup>579</sup> UNCHR (Sub-Commission), *ibid*.

<sup>580</sup> UNCHR (Sub-Commission), *ibid*.

States<sup>581</sup> have explicitly acknowledged ‘new minorities’<sup>582</sup> as RtoP beneficiaries. Furthermore, Libya highlights the significant bearing that the exclusion of non-citizens could have in practice. Libyan anti-government rebels have reportedly perpetrated human rights violations *mostly against* the Sub-Saharan migrant workers whom they consider to support the Gaddafi regime.<sup>583</sup> In addition, discriminatory national citizenship laws could mean that a “citizens” approach would exclude sections of a population which have been established in a State for generations. One example is the Rohingya minority.<sup>584</sup> Omitted from the 1982 Burmese Citizenship Laws,<sup>585</sup> the Rohingya became ‘Stateless through exclusion’<sup>586</sup> and the target of human rights violations.<sup>587</sup> At the time of writing, these violations include those potentially of the nature of RtoP crimes.<sup>588</sup>

## (ii) Primary RtoP’s Territorial Scope

A “citizens” beneficiary concept could serve to *widen primary RtoP’s territorial scope* of primary RtoP. As noted earlier, the Russian Foreign Minister claimed to be able to ‘exercise the responsibility to protect’<sup>589</sup> for ‘Russian citizens’<sup>590</sup> residing in South Ossetia. Arguably, the Foreign Minister’s statement suggests that Russia considers itself to owe its “citizens” a protective duty, both under the national constitution<sup>591</sup> and RtoP itself,<sup>592</sup> irrespective of whether its “citizens” reside *outside* its territorial borders. The Russia-Georgia conflict therefore raises the possibility that adopting a “citizens” beneficiary concept could encourage

<sup>581</sup> Refugees have only been expressly detailed as RtoP beneficiaries by Greece. See Statement of the Representative of *Greece* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV/5476. To date, only Chile and Swaziland have expressly accepted RtoP as encompassing protective obligations for non-nationals. Swaziland most clearly committed to this undertaking, directing that RtoP clearly encompasses an ‘obligation to protect immigrating populations’. Statement of the Representative of *Swaziland* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV/100. See also Statement of the Representative of *Chile* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV/98.

<sup>582</sup> UNCHR (Sub-Commission), ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities’ (n 578), 10.

<sup>583</sup> UNHRC, ‘Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya’ (n 494), 6, 7 and 8.

<sup>584</sup> The Rohingya are commonly referred to as the ‘Roma of Asia’. C Oberti, ‘Burma’s Rohingya Minority are the Roma of Asia’ (*France 24*, 22 June 2012) <<http://www.france24.com/en/20120622-burma-rohingya-ethnic-violence-muslim-buddhist-rahkine-aung-san-su-kyi>> accessed 2 August 2012.

<sup>585</sup> Sections 42-44 Burmese Citizenship Law 1982 cited in Human Rights Watch, ‘Report: The Government Could Have Stopped This: Sectarian Violence and Ensuing Abuses in Burma’s Arakan State’ (2012) 46 <[http://www.hrw.org/sites/default/files/reports/burma0812webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/burma0812webwcover_0.pdf)> accessed 3 August 2012.

<sup>586</sup> Human Rights Watch, *ibid*, 45.

<sup>587</sup> Human Rights Watch, *ibid*.

<sup>588</sup> For e.g. mass killings and the use of excessive force against the Rohingya by State security forces. Human Rights Watch, *ibid*, 26-27 and 29-30.

<sup>589</sup> “Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC” (n 365) and Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc S/PV/5952.

<sup>590</sup> “Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC”, *ibid*, emphasis added.

<sup>591</sup> The Foreign Minister may have been referring to the constitutional assurance that the ‘Russian Federation shall guarantee to its citizens protection and patronage abroad’, Constitution of the Russian Federation 1993 (adopted by referendum 12 December 1993, entered into force 25 December 1993) art 61 (2).

<sup>592</sup> “Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC” (n 365).

the RtoP framework to again be applied contrary to its territorial scope.

*(iii) Scope of the Harmful Acts which RtoP Covers*

Formulating the beneficiary concept to cover solely “civilians”, “citizens” or “people” could undermine the Outcome Document’s provision for RtoP to be applied in relation to war crimes, crimes against humanity, ethnic cleansing and genocide.<sup>593</sup> A “civilians” beneficiary concept provides a particularly useful illustration of the way in which RtoP’s beneficiary concept can directly interconnect with *the scope of the harmful acts* which it covers. Limiting beneficiaries to “civilians” could effectively exclude certain war crimes from falling within RtoP’s scope. For instance, a “civilians” approach would prevent the RtoP framework from being used in relation to war crimes perpetrated against persons actively participating in hostilities, including the conscription or recruitment of child soldiers<sup>594</sup> and the treacherous killing or wounding of combatants.<sup>595</sup> Indeed, calling for a “civilians” approach to be beneficiary concept during the Outcome Document drafting process, the US argued that the international community should discharge secondary RtoP in order to protect ‘civilian populations’<sup>596</sup> in situations ‘involving genocide, ethnic cleansing, crimes against humanity and *other large-scale atrocities*’.<sup>597</sup> Accordingly, there is scope to argue that some State support for a “civilians” beneficiary concept is inextricably linked to views on the harm which populations should sustain before RtoP’s discharge becomes warranted, specifically war crimes which meet the laws of war ‘grave breaches’<sup>598</sup> threshold.

There are three difficulties with limiting RtoP’s application to war crimes perpetrated against “civilians” only. Primarily, this undermines Outcome Document’s clear provision for RtoP to cover ‘war crimes’,<sup>599</sup> not only *heinous* violations of the laws of war perpetrated against *civilians*. The approach could also undermine the intended deterrent effect of codifying RtoP at the World Summit. Whilst liability could still arise in international and national courts for the perpetration of war crimes against those without “civilians” status (e.g. combatants and child soldiers), excluding these crimes from RtoP’s reach weakens its capacity to deter their commission. This includes the provision for the international

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<sup>593</sup> Outcome Document (n 333), paras 138 and 139.

<sup>594</sup> Rome Statute (n 444) art 8 (2) (b) (xxvi) and art 8 (2) (e) (vii).

<sup>595</sup> Rome Statute, *ibid*, art 8 (2) (b) (xi) and art 8 (2) (e) (ix).

<sup>596</sup> Statement of the Acting Representative of the *United States* to the UNGA, ‘US Proposals for UN Reform’ (22 June 2005) <[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 14 May 2012. (Statement of the Acting Representative of the *United States* to the UNGA, ‘US Proposals for UN Reform’).

<sup>597</sup> Statement of the Acting Representative of the *United States* to the UNGA, *ibid*.

<sup>598</sup> On the acts which would be considered as such within the Geneva Conventions and Rome Statute see Rome Statute (n 444) article 8 (2) (a) (i) - (viii).

<sup>599</sup> Outcome Document (n 333), paras 138 and 139.

community to respond to their perpetration in a ‘timely and decisive’<sup>600</sup> manner, including through the use of armed force.

Furthermore, restricting RtoP’s scope to heinous war crimes perpetrated against “civilians” challenges the objective underscoring RtoP’s formulation. That is, to provide a comprehensive framework through which the international community could apply a range of measures in response to internationally established crimes.<sup>601</sup> After all, the implication inherent in a “civilians” approach is that war crimes perpetrated against those actively participating in hostilities cannot be sufficiently egregious to ‘warrant such international attention’.<sup>602</sup> Indeed to some actors, RtoP’s connection with war crimes like the treacherous wounding of combatants is inconsistent with it being designed to cover ‘conscience-shocking’<sup>603</sup> harm. To this writer, Libya and Syria call into question this standpoint. Is it appropriate to state that the shooting of Syrian soldiers from behind<sup>604</sup> by the national military or pro-government militia because they refused to carry out a ‘shoot-to-kill policy’<sup>605</sup> on unarmed civilians is not ‘conscience-shocking’?<sup>606</sup> Is it suitable to rule out RtoP having a role in relation to the murder of forty four Syrian soldiers in order to prevent them from defecting from the national military?<sup>607</sup> Similarly, would it be in the spirit of the RtoP framework to exclude its application in response to the Libyan national army’s conscription of child soldiers, including by detaining them in locked properties until they were “ready” to fight?<sup>608</sup> Admittedly, such acts may not warrant applying the most non-peaceful responsive measures.<sup>609</sup> However, as discussed below, excluding these crimes via a “civilians”

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<sup>600</sup> Outcome Document, *ibid*, para 139.

<sup>601</sup> On this see particularly, ICISS Report (n 331), 1-11.

<sup>602</sup> Letter of the US Ambassador John Bolton to the UNGA President (30 August 2005) <[http://www.reformtheun.org/index.php?option=com\\_docman&task=cat\\_view&gid=15&limit=15&limitstart=0&order=date&dir=ASC&category=9&Itemid=240](http://www.reformtheun.org/index.php?option=com_docman&task=cat_view&gid=15&limit=15&limitstart=0&order=date&dir=ASC&category=9&Itemid=240)> accessed 14 May 2012. (Letter of the US Ambassador John Bolton to the UNGA President).

<sup>603</sup> ICISS Report (n 331), 33. Some of the stakeholders interviewed on the RtoP framework by Rosenberg are reported to have ‘expressed concern that the broad definition of war crimes included acts, which had little to do with the population suffering serious harm as described in the work of the ICISS report, such as compelling prisoners of war to serve in the forces of a hostile power or the killing or wounding of combatants who had surrendered’. S Rosenberg and E Strauss, “A Common Approach to the Application of the Responsibility to Protect” in D Fiott et al, *Operationalising the Responsibility to Protect: A Contribution to the Third Pillar Approach* (Brussels: The Madariaga College of Europe Foundation, 2012), 59.

<sup>604</sup> UNHRC, ‘Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic’ (n 493), 21.

<sup>605</sup> UNHRC, ‘Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic’, *ibid*.

<sup>606</sup> ICISS Report (n 331), 33.

<sup>607</sup> CNN Wire Staff, ‘Dozens of Defecting Soldiers Executed, Activists Say’ (*CNN*, 3 March 2012)

<<http://edition.cnn.com/2012/03/03/world/meast/syria-unrest/index.html>> accessed 14 May 2012.

<sup>608</sup> See further, ‘Gaddafi’s New Force of Child Soldiers Revealed’ *The Scotsman* (Edinburgh, 17 April 2011) <<http://www.scotsman.com/news/gaddafi-s-new-force-of-child-soldiers-revealed-1-1588436>> accessed 14 May 2012.

<sup>609</sup> Scheffer takes a similar view, arguing that ‘[i]n reality, not all atrocity crimes, particularly some categories of crimes against humanity and war crimes, necessarily justify military intervention as the most extreme application of RtoP’. However, he correctly warns that ‘[d]rawing the line between atrocity crimes that would merit and those that would lack justification for military intervention could become an extremely difficult task in world affairs’. D Scheffer, “Atrocity Crimes Framing the Responsibility to Protect” in R Cooper and J Kohler (eds),

beneficiary concept could also undermine RtoP's capacity to *prevent* mass atrocity crimes against "civilians" because it narrows the means through which RtoP can be discharged.

#### *(iv) Scope of Implementation Means*

Limiting RtoP beneficiaries to "civilians", "citizens" or "people" could curtail the scope of the means which can be used to implement RtoP in practice. A "civilians" beneficiary concept could exclude using means which are focused upon persons actively participating in hostilities, not least child soldiers. The UNSG's 2009 RtoP Report recommends that the international community encourage States to release child soldiers from armed groups/militaries.<sup>610</sup> This is a viable route through which to respond to RtoP crimes (i.e. the war crime of recruiting or conscripting child soldiers) and preventing further RtoP crimes from being perpetrated in the State (e.g. further RtoP crimes being committed against civilians by the military/armed group that the child soldier serves). Accordingly there is scope to argue that a "civilians" beneficiary concept could undermine the RtoP framework from being effectively applied to *prevent* and *respond* to some RtoP crimes.

A "citizens" beneficiary concept gives cause for concern over whether it could prevent the use of means to protect 'new minorities'<sup>611</sup> like refugees and migrant workers. On the one hand, restricting RtoP beneficiaries to "citizens" could undermine States implementation of certain means in order to comply with their responsibility to prevent RtoP crimes from arising, including the national authorities of non-State parties deciding to accede to 'relevant international instruments on [...] refugee law'.<sup>612</sup> In addition, we should be cautious over the way in which a "citizens" beneficiary concept could weaken primary RtoP's capacity to protect some minority groups who are established in a State, particularly by undermining the way in which RtoP *encourages* States to more robustly implement human rights law in order to prevent RtoP crimes from arising. In the field of minority rights, it is documented that some States have implemented discriminatory national citizenship policies in order to exclude minorities from acquiring the right to participate in the public life of the State<sup>613</sup> (e.g.

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*Responsibility to Protect The Global Moral Compact for the 21st Century* (Palgrave Macmillan, New York 2009), 77.

<sup>610</sup> UNSG Report 2009, Implementing RtoP (n 331), 16 and 17.

<sup>611</sup> UNCHR (Sub-Commission), 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' (n 578), 10.

<sup>612</sup> UNSG Report 2009, Implementing RtoP (n 331), 11.

<sup>613</sup> UNHRC, 'Report of the Independent Expert on Minority Issues' (2 February 2007) UN Doc A/HRC/4/9 ['The Independent Expert is required to identify best practices and possibilities for technical cooperation by OHCHR. As a practical measure she has begun focusing on three priority areas of work: policing and maintenance of security in multi-ethnic societies (in collaboration with the Working Group on Minorities); *the arbitrary denial or deprivation of citizenship to certain minority groups as a tool to exclude minorities from due benefits or reasonable participation*; and equal access to quality education and other education-related issues, including access to education in minority languages', emphasis added, 6] and UN Commission on Human Rights, 'Specific Groups and Individuals: Minorities, Report of the Independent Expert on Minority Issues' (6 January 2006) UN

sitting a language exam in order to acquire citizenship<sup>614</sup>). The effective implementation of the right to participation in public life of persons belonging to a territorially cohesive minority can contribute to the prevention of RtoP crimes by (i) deterring Kin States from taking action against a State that they consider is discriminating against a minority group by subjecting it to more stringent citizenship requirements than other sections of its population;<sup>615</sup> and (ii) reduce the risk of a minority feeling aggrieved by or disassociated from the State, thereby helping to diminish the development of centri-fugal tendencies which can, in some cases, encourage territorially cohesive minorities to claim a right to autonomy or secession.<sup>616</sup> With regard to nomadic minorities (e.g. Roma), the effective implementation of participation rights can help to foster positive relations between disparate groups by giving all societal members a role in the public life of the State.<sup>617</sup> This helps to prevent “populism”,<sup>618</sup> including the incitement of RtoP crimes against the group that is denied national citizenship. Arguably, these potential implications suggest that we should be mindful to the possibility that some States may utilise a “citizens” beneficiary in order to (i) evade primary RtoP’s support for better implementation of human rights; and (ii) better accommodate their national political interests (e.g. tensions toward certain groups and national citizenship policies).

### 3.1.2 Implications for the Wider Obligations to which RtoP relates

A “civilians”, “citizens” or “people” beneficiary concept could equally contradict and/or

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Doc E/CN.4/2006/74 [‘In some States, important debates about language, religion, social inclusion, political participation, citizenship, poverty and identity often assume a negative tone that is not conducive to social cohesion or harmony’, 15].

<sup>614</sup> Kemp, Popovski and Thakur (n 368), 77.

<sup>615</sup> For examples of such action in practice see Kemp, Popovski and Thakur, *ibid*.

<sup>616</sup> For a good account of the significance, development and implications of centri-fugal tendencies among minority groups see especially, H Quane, ‘Rights in Conflict? The Rationale and Implications of Using Human Rights in Conflict Prevention Strategies’ (2007) 47 VA. J. Int’l L. 463, 499.

<sup>617</sup> As Eide explains: ‘Special problems arise when a part of the settled residents of the country having an ethnic, linguistic or religious identity different from that of the majority is denied citizenship. This effectively blocks that group from participating in the political processes and could be a strong indicator that the Government is not representative of the whole people. In this situation also however, the primary effort should be to ensure that they obtain citizenship, rather than secession’. UN Human Rights Commission, Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities’ (n 461), 18.

<sup>618</sup> On this see OSCE HCNM, ‘The Rise of Populism and its Implications for National Minorities’ (Keynote Speech by Knut Vollebaek OSCE HCNM at the ‘European Year of Intercultural Dialogue: The Minority Agenda’ seminar hosted by the Socialist Group in the European Parliament (PSE Group), Belgium, 11 December 2008) 3-4 <<http://www.osce.org/hcnm/62452>> accessed 12 November 2012. The UNSG alludes to the way in which populist, rather than responsible politics, can underscore the perpetration of RtoP crimes. He notes: ‘need to move from *identity-based politics* to the *effective management*, even encouragement, of diversity through the principle of non-discrimination and the *equal enjoyment of rights*. Responsible sovereignty is based on the *politics of inclusion, not exclusion*. This entails the building of institutions, capacities and practices for the *constructive management of the tensions* so often associated with the uneven growth or rapidly changing circumstances that appear to benefit some groups more than others’, emphasis added. UNSG Report 2009, Implementing RtoP (n 331), 10.



undermine present understanding of some of the human rights, humanitarian and criminal law obligations to which the RtoP framework relates. These potential implications merit further consideration.

### *(i) Human Rights*

A “civilians”, “people” or “citizens” beneficiary concept generally undermine the fact that the majority of human rights to which the RtoP framework relates (e.g. right against torture, right to life) are formulated for the protection of all “individuals” in a States territory and under its effective control.

A “people” beneficiary concept could have some more specific implications. International human rights law recognises “people” as the holders of the right to self-determination.<sup>619</sup> This writer would argue that a “people” beneficiary concept could further complicate the role of the RtoP framework in contexts where a group seeks international recognition of their status as a “people” with a right to self-determination. It may be helpful to first outline what this role might be. The Outcome Document makes clear that RtoP should be implemented in relation to four specific crimes.<sup>620</sup> Accordingly, the international community can apply secondary RtoP in cases where a group claiming recognition as a “people” are threatened by, or the victims of, the four crimes. The purpose of secondary RtoP in such cases would be to protect the group from the four crimes and not to help them gain self-determination. However, there is the possibility that, in order to protect a group from further RtoP crimes, the international community could be seen as recognising indirectly the group as a ‘people’ with a *remedial* right to self-determination.<sup>621</sup> This would put RtoP in the centre of the debate over whether such a right exists.

The overlap between a “people” beneficiary concept and the right to self-determination could entail further policy implications. First, reference can be made to Russia’s actions in the immediate aftermath of its conflict with Georgia. Russia supplemented its invocation of RtoP to justify its use of armed force against Georgia by recognising the secessionist enclaves of South Ossetia and Abkhazia as independent “States”.<sup>622</sup> Russia’s explanation for its recognition of the enclaves as “States” is largely resonant of recognising the secessionist

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<sup>619</sup> ICCPR (n 386) art 1 (1) and International Covenant on Economic, Social and Cultural Rights 1966 (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 art 1 (1). For a discussion of international human rights law and ‘people’ as holders of the right to self-determination, see generally J Rehman, *International Human Rights Law* (Pearson, Harlow 2010) 472-73.

<sup>620</sup> Outcome Document (n 333), paras 138 and 139.

<sup>621</sup> The meaning of a remedial right to self-determination was outlined in chapter one in the discussion of present literature regarding the factors which motivate Kin States to intervene in the State in which the kin minority is located.

<sup>622</sup> ‘Medvedev Announces Independence for South Ossetia and Abkhazia’ (*Russia Today*, Moscow, 27 August 2008) <<http://www.rt.com/news/medvedev-announces-independence-for-south-ossetia-and-abkhazia/>> accessed 11 May 2012.

movements as a “people” with a remedial right to self-determination. To this effect, Russia explained that its recognition was with respect to the need to protect the people of these secessionist enclaves from (the RtoP crime) genocide.<sup>623</sup> At a general level, this example suggests that a “people” beneficiary concept could therefore create a tension between the scope of the right to self-determination (i) implemented generally (no remedial right to self-determination); and (ii) implemented in a specific RtoP context (remedial right to self-determination). In the specific context of RtoP cases involving a territorially cohesive minority, the Russian example illustrates the way in which the link between a “people” beneficiary concept and the right to self-determination could *further encourage* *Kin States* like Russia *to invoke* RtoP-type rhetoric to justify their recognition of a minority group’s remedial right to self-determination. This could compound fears that group rights can, in the context of minorities, create a “slippery-slope” to secession and, furthermore, that discharging secondary RtoP in contexts involving self-determination claims can sometimes lead to secession so as to ensure the group is protected from further RtoP crimes.

Second, there is the danger that a “people” beneficiary concept could *encourage* a group to deliberately cause the State to perpetrate mass atrocity crimes against it in order to compel the international community to intervene in order to protect them and to recognise them as a “people” with a *remedial* right to self-determination.<sup>624</sup> Admittedly, there is limited empirical evidence to sustain the view that the RtoP framework will generally increase these so-called ‘suicidal rebellions’.<sup>625</sup> However, reference should be made to the recent declaration of Northern Mali as the new “State of Azawad” by Tuareg affiliated rebels.<sup>626</sup> There are two significant aspects to this declaration. First, the rebels justify the creation of the “State” on

<sup>623</sup> ‘Medvedev Announces Independence for South Ossetia and Abkhazia’, *ibid.* [Referring to risk of genocide emanating from Georgia and arguing that it is therefore “necessary to make a decision” regarding the status of these territories].

<sup>624</sup> Gray argues that the use of force in response to mass atrocity crimes entails ‘clear dangers that this will encourage those seeking independence to use violence to provoke a repressive response’. C Gray, *International Law and the Use of Force* (3rd edn OUP, Oxford 2008) 64. Engle makes a similar observation, arguing that ‘increasing support for forceful humanitarian intervention has pressed some warring factions and their advocates to argue that opponents are committing atrocities worthy of intervention’. See K Engle, ‘Calling in the Troops: The Uneasy Relationship between Women’s Rights, Human Rights and Humanitarian Intervention’ (2007) 20 *Harv Hum Rts J* 189, 138.

<sup>625</sup> On the concept of “suicidal rebellions” see A J Kuperman, ‘Suicidal Rebellions and the Moral Hazard of Humanitarian Intervention’ (2005) 4 (2) *Ethnopolitics* 149. Kuperman has subsequently suggested that RtoP could cause an increase in suicidal rebellions, stating that RtoP ‘creates a moral hazard that encourages the excessively risky behavior of rebellion by members of groups that are vulnerable to genocidal retaliation, but it cannot fully protect these groups against the backlash. The emerging norm thereby causes some genocidal violence that otherwise would not occur’. A J Kuperman, ‘Rethinking the Responsibility to Protect’ (Winter/Spring 2009) *Whitehead Journal of Diplomacy and International Relations* 33, 36. See also A J Kuperman, ‘The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans’ (2008) 52 *International Studies Quarterly* 49. Belloni endorses this to some extent, suggesting that RtoP can encourage rebel groups to *continue* their existing struggle in pursuit of international support for their cause. R Belloni, ‘The Tragedy of Darfur and the Limits of the Responsibility to Protect’ (2006) 5 (4) *EP* 326, 331. These arguments are refuted by Bellamy and Williams who use empirical data to illustrate that there has been no measurable increase in new suicidal rebellions nor in the duration and escalation of existing conflicts since RtoP’s construction. A J Bellamy and P D Williams, ‘On the Limits of Moral Hazard: The ‘Responsibility to Protect’, Armed Conflict and Mass Atrocities’ (2012) 18 (3) *EJIR* 539, 544-550.

<sup>626</sup> Mouvement National de Liberation de l’Azawad, ‘Déclaration d’Indépendance de l’Azawad’ (n 470), para 5.

the perpetration of RtoP crimes against the Azawad people.<sup>627</sup> Second, the rebels have repeatedly announced to the “international community” that RtoP-type crimes have been perpetrated by Malian State actors, calling for it to *take action to protect* the “Azawad” people.<sup>628</sup> To date, no State has recognised “Azawad” as a State and ECOWAS has requested the UNSC to authorise it to use armed force in order to overthrow the rebels and restore Mali’s internationally recognised borders.<sup>629</sup> At the time of writing, the UNSC has not provided this authorisation.<sup>630</sup> The case nevertheless illustrates the way in which the RtoP framework could form the basis of suicidal rebellions and reinforce secessionist tendencies more generally, especially if associated with a “people” beneficiary concept.

Admittedly, secession and suicidal rebellions have been apprehended as potential implications of wider national-international linked protection frameworks, including the minority rights regime proposed for adoption by the League of Nations.<sup>631</sup> However, an explicit link between the international protection of a “people” when the State fails to do so and the RtoP framework, a framework encompassing the use of armed force, entails the further implication of debasing existing understandings of (i) the scope and character of the right to self-determination (i.e. remedial); and (ii) the extent to which States’ sovereignty and territorial integrity should be respected by the international community. These potential implications could strengthen existing reservations that RtoP’s implementation will challenge the right to self-determination as traditionally conceived. Cuba has, for example, stated that it:

‘Rejects the attempt to impose the acceptance of the so-called ‘responsibility to protect’, which in the current world situation will only facilitate interference, pressure and intervention in the domestic affairs of our States by the superpowers and their allies, openly and permanently threatening the full enjoyment of the right to self-determination of our peoples’.<sup>632</sup>

<sup>627</sup> Mouvement National de Liberation de l’Azawad, *ibid*, paras 5. [‘Rappelant les massacres, les exactions et humiliations, spoliations et génocides de 1963, 1990, 2006, 2010 et 2012, qui ont visé exclusivement le peuple de l’AZAWAD jusqu’au 1er avril 2012’].

<sup>628</sup> Mouvement National de Liberation de l’Azawad, ‘Des civils victimes des tirs de l’armée malienne’ (*Mouvement National de Liberation de l’Azawad*, 23 February 2012) (*in French*) <<http://www.mnlamov.net/droits-de-lhomme.html>> accessed 6 July 2012.

<sup>629</sup> See UN News, ‘Security Council Examining Request for UN Mandate for African Troops in Mali’ (n 471).

<sup>630</sup> UN News, ‘Security Council Examining Request for UN Mandate for African Troops in Mali’, *ibid*.

<sup>631</sup> For e.g. Woodrow Wilson’s Secretary of State argued that incorporating a self-determination provision in the Covenant of the League of Nations was: ‘[L]oaded with dynamite. It will raise hopes which can never be realised. It will, I fear cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist, who failed to realise the danger until too late’. Statement of R Lansing cited in P Thornberry, *International Law and the Rights of Minorities* (OUP, Oxford 1991) 31.

<sup>632</sup> Statement of the Representative of Cuba to the UNGA, ‘Informal Meeting of the Plenary on the High Level Plenary Meeting of the General Assembly of September 2005’ (June-July 2005) <[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 12 May 2012. See also Statement of the Representative of Cuba to the UNGA in UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 489).

International criminal and humanitarian law does not require that victims of mass atrocity crimes have formal citizenship of the State in which the crimes at issue were perpetrated. Moreover, they clearly state that persons not possessing the status of “civilians” are to be protected from war crimes, in certain circumstances.<sup>633</sup> In view of this, it could be argued that recognising “citizens” and “civilians” as RtoP beneficiaries would directly contradict those who are recognised by international law as persons protected from mass atrocity crimes.

Perhaps the most significant effect on international humanitarian law of identifying “civilians” as RtoP beneficiaries is that it would undermine the established scope of war crimes. As noted earlier, the laws of war extend beyond grave breaches to ‘other serious violations of the laws and customs applicable in armed conflicts’,<sup>634</sup> thereby providing some protection to those who do not have “civilians” status. Thus, a “civilians” beneficiary concept could lead to a conflict between those recognised as the protected persons of mass atrocity crimes (i) generally (as defined under existing obligations); and (ii) in a specific RtoP context (as defined according to the beneficiaries of RtoP). Moreover it could lead to variations between the scope of war crimes (i) under existing obligations (that is, grave and other breaches perpetrated against civilians and those actively engaged in hostilities); and (ii) under RtoP (that is, grave breaches perpetrated against “civilians”).

### 3.1.3 The Concept of the Beneficiary in State Practice: General Findings

The table summarises the varying approaches taken to RtoP beneficiaries in State views to date.

Table C: Trends in State Views on RtoP's Beneficiary Concept

Beneficiary Concept	Requirements for Beneficiary Status	General Findings
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<sup>633</sup> Prominent examples include members of armed forces or groups and child soldiers.

<sup>634</sup> Rome Statute (n 444) art 8 (2) (b) and (e).

State Views (1) - 'Civilians'	Civilians Status e.g. not actively participating in hostilities	<p>Potentially Exclude those Actively Participating in Hostilities;</p> <p>Potentially Narrows the Range of War Crimes which can Activate Secondary RtoP, creating a Tension Between the Scope of War Crimes under International Criminal Law and the RtoP Framework;</p> <p>Potentially Undermines the Range of Measures which can be Used to Discharge Primary and Secondary RtoP e.g. Ensuring the Disarmament of Child Soldiers.</p>
State Views (2) - 'Citizens'	National Citizenship of the Sovereign State in which they Reside	<p>Potentially Excludes "New Minorities" e.g. Refugees, Migrant Workers;</p> <p>Potentially Excludes Groups Established in the State for Some Time but who are Excluded from National Citizenship Laws e.g. Rohingya;</p> <p>Undermines the Prospect for Primary RtoP to Encourage Better Implementation of Participation Rights and Non-Discriminatory National Citizenship Policies, thereby potentially weakening RtoP's Contribution to Preventing the Perpetration of RtoP Crimes in the Course of Violent Claims to Secession by a Territorially Cohesive Minority.</p>
State Views (3): 'People(s)'	A Recognised Right to Self-Determination	<p>Potentially Excludes those without a Recognised Right to Self-Determination;</p> <p>Risk that it could Strengthen the Argument that there Exists a Remedial Right to Self-Determination, thereby Encouraging Secessionist Tendencies;</p> <p>Potentially Encourages "Suicidal Rebellions".</p>

A "civilians", "citizens" and "people" beneficiary concept could impact upon the RtoP framework and the existing obligations to which it relates. Either beneficiary concept could narrow who is to be protected from RtoP crimes, thereby undermining Rwanda<sup>635</sup> and Sweden's<sup>636</sup> interventions at the World Summit in order to ensure that an all-inclusive beneficiary concept was formulated. Why then have these trends emerged in State views? As States have not explicitly explained their standpoint on the beneficiary concept no explanation for the trends can be given with any certainty. States may have simply drawn upon the protected persons of RtoP crimes. Notably, "civilians"<sup>637</sup> are recognised to be the protected persons of certain war crimes, whilst the "*civilian* population"<sup>638</sup> is to be protected from crimes against humanity. Accordingly, a "civilians" beneficiary concept may flow from the legal definitions of two of the crimes that RtoP covers. However, we have seen that

<sup>635</sup> Statement of the Representative of *Rwanda* to the UNGA in WFM Report (n 557) and *Rwanda*, 'Proposed RtoP Language for September Outcome Document' (n 559).

<sup>636</sup> Statement of the Representative of *Sweden* to the UNGA in WFM Report, *ibid*.

<sup>637</sup> See for e.g. Rome Statute (n 444) art 8 (2) (b) (i) and (ii).

<sup>638</sup> Rome Statute, *ibid*, art 7 (1), *emphasis added*.

“civilians” are not the sole beneficiaries of the laws of war and, furthermore, that the other mass atrocity crimes RtoP covers do not limit protection to those with citizenship or a recognised right to self-determination. Perhaps the most persuasive explanation of State views is that they may be underscored by the all-inclusive character of a ‘populations’<sup>639</sup> beneficiary concept, specifically that it requires *all persons* are to be protected from RtoP crimes. This could open up the possibility of certain persons effectively having *concurrent status as an RtoP bearer and beneficiary*.

There is some merit to this concurrence. If non-State actors began perpetrating RtoP crimes against State actors, the application of secondary RtoP to protect the primary RtoP bearer may be justified. However, concurrent bearer and beneficiary status can soon become complex and politically controversial. For example, what should happen when, as in the Côte d’Ivoire, Libya and Syria, State actors perpetrate RtoP crimes against the population and non-State actors armed responses involve the perpetration of RtoP crimes? In such contexts, national authorities would bear primary RtoP *and* be included among secondary RtoP’s beneficiaries, despite the fact that they began perpetrating RtoP crimes in the first place. This concurrent status could complicate the international community’s discharge of secondary RtoP by requiring it to ensure the protection of the primary RtoP bearer and the remainder of the population. If the international community is to protect the primary RtoP bearer from RtoP crimes then how could it, for instance, carry out robust military action to protect the remainder of the population from RtoP crimes perpetrated by national authorities? If equal protection is to be granted without distinction between bearers and beneficiaries, would it be legitimate for sanctions to be applied against individual members of the national authorities because they have perpetrated RtoP crimes but not against individual members of rebel groups who have perpetrated RtoP crimes, albeit on a lesser scale?

Whilst a “citizens” and “people” beneficiary concept would not overcome the issue of concurrent status (i.e. because primary RtoP bearers are likely to also have such status), a “civilians” concept helps to override the implication that the international community should protect national authorities actively participating in hostilities when they are using armed force to discharge secondary RtoP.<sup>640</sup> This is particularly true when, as in Libya, the mandate for the use of force is explicitly limited to the ‘protection of civilians’.<sup>641</sup> However, using a “civilians” beneficiary concept in order to circumvent the risk of concurrent bearer/beneficiary status could invite challenges over whether the RtoP framework adequately upholds existing international obligations. It is important to recall here that even

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<sup>639</sup> Outcome Document (n 333), paras 138 and 139.

<sup>640</sup> On the difficulty between ensuring that military activities can be conducted effectively and that war crimes are not committed as a result of these activities see R Cryer (ed), *An Introduction to International Criminal Law and Procedure* (CUP, Cambridge 2007) 224-25.

<sup>641</sup> UNSC Res 1973 (n 414), paras 4, 5 and 6.

those who do owe primary RtoP and have failed to implement it are, by reason of their *basic human identity*, entitled to be protected from human rights and humanitarian law violations, including those committed by actors in the course of their discharge of secondary RtoP. To do otherwise, creates challenges to the legitimacy of the RtoP framework in both the eyes of the population of the State in which secondary RtoP is being applied and among members of the international community, particularly those who are cautious regarding the RtoP framework.<sup>642</sup>

Despite the significant implications of State views, there is limited discussion of RtoP's beneficiary in the existing literature.<sup>643</sup> Generally, commentators<sup>644</sup> simply restate the fact that the Outcome Document provided that 'populations'<sup>645</sup> are beneficiaries. However, some of the arguments made above tend to reinforce those of Luck.<sup>646</sup> First, this writer's observation that a "citizens" beneficiary concept could serve to exclude non-citizens tends to add weight to Luck's<sup>647</sup> persuasive argument that the citizenship beneficiary concept used intermittently in the ICISS Report could have served to exclude those without citizenship of the State in which they reside. Notwithstanding this, State views tend to call into question Luck's argument that the Outcome Document's 'populations'<sup>648</sup> beneficiary concept was 'a major step forward',<sup>649</sup> clarifying that RtoP protects 'all [...] people'<sup>650</sup> in a States territory 'be they citizens, be they immigrants, legal or illegal'.<sup>651</sup> Admittedly, 'populations'<sup>652</sup> is a more inclusive beneficiary concept and therefore an improvement on earlier Reports.<sup>653</sup> However, Luck's argument tends to presuppose that, because States accepted the Outcome Document, they have continued to recognise that 'all people'<sup>654</sup> are RtoP beneficiaries in subsequent

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<sup>642</sup> Pattison terms this dual notion of "legitimacy" as 'internal' (i.e. legitimate to the people of the State) and 'external' (i.e. to the broader international community). See generally, J Pattison, 'Humanitarian Intervention, the Responsibility to Protect and Jus in Bello' (2009) 1 GRtoP 364.

<sup>643</sup> The varying positions on RtoP's beneficiary concept in present literature were outlined at length in chapter one.

<sup>644</sup> The majority of commentators restate this. However, the following are useful examples: W Pace and N Deller, 'Preventing Future Genocides: An International Responsibility to Protect' (2005) 36 (4) World Order 15, 26; N Wheeler, *Operationalising the Responsibility to Protect: The Continuing Debate Over where Authority should be Located for the Use of Force* (Norwegian Institute for International Affairs, Oslo 2008) 16; Peters (n 508), 522 and Wheeler and Egerton (n 527), 123.

<sup>645</sup> Outcome Document (n 333), para 138-139.

<sup>646</sup> E C Luck, 'The Normative Journey: The Evolution of the RtoP Concept' (Keynote address at the European Science Foundation Conference: The Responsibility to Protect from Principle to Practice, Linköping, Sweden, 9 June 2010).

<sup>647</sup> Luck, 'The Normative Journey: The Evolution of the RtoP Concept', *ibid.* See further, E C Luck, 'The United Nations and the Responsibility to Protect' (August 2008) The Stanley Foundation Policy Analysis Brief, 6-8 <<http://www.stanleyfoundation.org/policyanalysis.cfm?id=345>> accessed 8 October 2012 ['In what was widely hailed as a historic breakthrough, the 2005 World Summit unanimously affirmed the primary and continuing legal obligations of states to protect their populations—*whether citizens or not*—from genocide, war crimes, ethnic cleansing, and crimes against humanity, and from their incitement', emphasis added, 2].

<sup>648</sup> Outcome Document (n 333), para 138-139.

<sup>649</sup> Luck, 'The Normative Journey: The Evolution of the RtoP Concept' (n 646).

<sup>650</sup> Luck, *ibid.*

<sup>651</sup> Luck, *ibid.*

<sup>652</sup> Outcome Document (n 333), para 138-139.

<sup>653</sup> ICISS Report (n 331); UNSG Report, 'In Larger Freedom' (n 331) and HLP Report (n 331).

<sup>654</sup> Luck, 'The Normative Journey: The Evolution of the RtoP Concept' (n 646).

practice. The present author would suggest that the use of alternative beneficiary concepts in the overwhelming majority of State views challenges this opinion. Furthermore, the nature of the beneficiary concepts used in State views could undermine Luck's view that specific groups like 'immigrants'<sup>655</sup> are protected by reason of their membership in States' "populations". On the contrary, this writer has argued that the implication inherent in the beneficiary concepts used in State views is that whole sections of "populations" could be excluded as beneficiaries because they lack particular status (e.g. civilians, citizenship, holders of a right to self-determination).

This relates to a wider theme in the literature, specifically the tendency of some commentators<sup>656</sup> to argue that *specific sections* of a States' population are beneficiaries of the RtoP framework. Key examples include (i) refugees<sup>657</sup>; and (ii) persons belonging to national and other minority groups<sup>658</sup>. Considering that such persons would be included is a logical and reasonable outcome of the Outcome Document's all-inclusive 'populations'<sup>659</sup> beneficiary concept. However, State views raise the possibility that the specific groups mentioned in present literature may, due to factors beyond their control like refugee status, be excluded from the ambit of the "citizens" beneficiary concept favoured by a number of States.<sup>660</sup> Consequently, this writer would argue that it is perhaps too much to suggest, as Rimmer<sup>661</sup> does, that 'the real test of'<sup>662</sup> RtoP is whether it develops to focus upon the protection needs of particular sections of States populations, such as refugees.<sup>663</sup> Instead, this writer would argue that some States preference for identifying beneficiaries as "citizens" might suggest that 'the real test'<sup>664</sup> of RtoP is whether refugees come to be recognised as RtoP beneficiaries *at all*.

Arguments in present literature regarding the basis on which the relationship between

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<sup>655</sup> Luck, *ibid*.

<sup>656</sup> See for e.g. R Cohen, 'Reconciling RtoP with IDP Protection' (2010) 2 GRtoP 15; The Editors, 'Special Issue for GRtoP: Protecting IDPs and Refugees' (2010) 2 GRtoP 5, 7; E Mooney, 'Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts Between RtoP and IDP Protection' (2010) 2 GRtoP 60; N Turner and N Otsuki, *The Responsibility to Protect Minorities and the Problem of the Kin State* (United Nations University, Tokyo 2010) and Kemp, Popovski and Thakur (n 368).

<sup>657</sup> Cohen, Mooney and The Editors, *ibid*.

<sup>658</sup> Turner and Otsuki (n 656) and Kemp, Popovski and Thakur (n 368).

<sup>659</sup> Outcome Document (n 333), paras 138-139.

<sup>660</sup> For e.g. Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5319; Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (November 2007) UN Doc S/PV/578; Statement of the Representative of *Sri Lanka* to the UNSC, UNSC Verbatim Record (December 2009) UN Doc S/PV/6216(Res.1); Statement of the Representative of *Myanmar* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100. All State views referring to "citizens" are detailed in Annex II (B) (c). State views referring to "citizens" beneficiary concept are detailed in Annex II (B) (c).

<sup>661</sup> S Rimmer, 'Refugees, Internally Displaced Persons and the "Responsibility to Protect"' (March 2010) New Issues in Refugee Research, Research Paper No 185, UNHCR.

<sup>662</sup> Rimmer, *ibid*, 16.

<sup>663</sup> Rimmer, *ibid*.

<sup>664</sup> Rimmer, *ibid*.



RtoP bearer and beneficiary should be adjudged are also relevant here. Abo's<sup>665</sup> view is that RtoP establishes 'a relationship between State and people which is in many ways the *reverse* of the old concept: a relationship built on notions of citizenship'.<sup>666</sup> Stahn's<sup>667</sup> view is that the RtoP framework replicates the premises of Social Contractarian thought, namely that the State protects the population from RtoP crimes and in return the population adheres to its laws.<sup>668</sup> The present author would argue that as a quarter of the surveyed State views refer to "citizens" as beneficiaries, we cannot conclusively accept Abo's<sup>669</sup> contention that RtoP has eradicated citizenship as the regulatory standard for a States protection of its population.

Stahn's<sup>670</sup> view does tend to better accommodate the citizenship beneficiary concept in State views. The implication of limiting beneficiaries to those with citizenship is that States will protect those who in turn protect the State by, for instance, obeying its domestic laws. However, formulating the relationship between RtoP bearer and beneficiary as per Social Contract theory has significant drawbacks which are overlooked in present literature. Doctrinally, the idea of a Social Contract as the basis of protection tends to undermine the Outcome Document provisions on primary RtoP. A Social Contract is by its very nature *bilateral*, whereas the Outcome Document provided only for the *unilateral* duty of the State to protect its population. The original intention then was not to predicate primary RtoP on the *mutuality of responsibility* which is inherent in citizenship or Social Contract theory. At a policy level, there is limited attention given to the fact that basing the relationship between bearer and beneficiary around concepts of citizenship and Social Contract tends to reinforce the bond between State and national and, therefore, potentially encourage a return to civic nationalism which can (i) strengthen bonds between citizens and Kin States;<sup>671</sup> and (ii) create

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<sup>665</sup> E Abo and M Hammer, *Yes We Can? Options and Barriers to Broadening the Scope of the Responsibility to Protect to Include Case of Economic, Social and Cultural Rights Abuse* (One World Trust, London 2009) 3.

<sup>666</sup> Abo and Hammer, *ibid*.

<sup>667</sup> Stahn, 'The Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 534).

<sup>668</sup> On the concept of "sovereignty as responsibility" inherent to the RtoP framework, Stahn notes that: 'The understanding that the State exercises the functions of an agent and trustee for the human beings who are affected by the consequences of State action is not a twentieth-century principle, but can be traced much further back. [...]. A similar understanding of the State is reflected in the work of contract theorists. John Locke viewed the relationship between the State and its citizens in terms of "trust"'. Furthermore, Stahn argues that RtoP's "sovereignty as responsibility" notion finds basis in the work of Hugo Grotius, 'whose conception of law was based on the assumption that the rules governing the organisation and behaviour of States exist ultimately for the benefit of the actual subjects of the rights and duties concerned, individual human beings'. Stahn, 'The Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *ibid*, 111, ellipsis added.

<sup>669</sup> Abo and Hammer (n 665), 3.

<sup>670</sup> Stahn, 'The Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 534), 111.

<sup>671</sup> For e.g. between ethnic Germans residing abroad and Germany during World War Two. Eide directs that '[d]uring the Second World War Germany favoured the transfer of ethnic Germans from isolated communities in Eastern Europe to the Reich'. A Eide, "Ethnic Conflicts and Minority Protection: Roles for the International Community" in K Rupasingha and V Tishkov, *Ethnicity and Power in the Contemporary World* (UN University Press, Tokyo 1996)

<<http://archive.unu.edu/unupress/unupbooks/uu12ee/uu12ee0q.htm#14.%20ethnic%20conflicts%20and%20minority%20protection:%20roles%20for%20the%20international%20commun>> accessed 6 July 2012.

tensions against non-nationals within the State.<sup>672</sup> These risks are wholly at odds with primary RtoP's purpose. Whilst strengthening relationships between bearer and beneficiary on the basis of citizenship/nationality ties could culminate in violent clashes between States (as in Russia-Georgia), history shows that 'reverse ethnic cleansing'<sup>673</sup> may be one outcome of tensions against non-nationals who are implicated in the previous commission of RtoP crimes against nationals.

## 3.2 International Practice

Examination of international practice suggests that three competing approaches have been taken to the concept of the RtoP beneficiary. It is useful to consider the merits and potential drawbacks of these approaches respectively.

### 3.2.1 Approach One: "Populations"

In general international/regional instruments, RtoP's beneficiary concept has been codified pursuant to the Outcome Document (i.e. as "populations"<sup>674</sup>). This has also been the approach taken in some international and regional instruments which have recalled the RtoP framework in relation to particular situations, such as Darfur and Burma.<sup>675</sup> Notably, these extracts are affirmations of the Outcome Document RtoP provisions per se and, therefore, we would expect its beneficiary concept to be reiterated.

More recent international/regional instruments which recall RtoP in relation to specific situations have dealt with the beneficiaries of primary and secondary RtoP differently. For example, UNHRC and UNSC Resolutions on Libya and Syria recalled that national authorities owe primary RtoP to their 'populations'.<sup>676</sup> In contrast, secondary RtoP

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<sup>672</sup> As occurred in the post-World War Two settlements and underscored the Potsdam Protocols, for example. On this see, J Z Muller, 'Us and them the Enduring Power of Nationalism' *Foreign Affairs* (2008) <<http://www.foreignaffairs.org/20080301faessay87203/jerry-z-muller/us-and-them.html>> accessed 6 July 2012 and Thornberry, *International Law and the Rights of Minorities* (n 631), 114.

<sup>673</sup> ICISS Report (n 331), 40-41. As Kymlicka further explains, '[I]n those cases where minorities seized territory and established their own autonomous governments, the results were often various forms of discrimination and harassment-- even ethnic cleansing-- against anyone who did not belong to the minority' and further 'there is anxiety that such minorities are irredentist-- that is, that they wish to redraw international boundaries so as to unite (or reunite) the territory where they live with their adjacent kin State. Indeed, it is often assumed that they would collaborate willingly with their kin State if it militarily invaded the country in order to claim this territory.' See W Kymlicka, 'The Internationalisation of Minority Rights' (2008) 6 (1) *ICON* 1, 24 and 25 respectively.

<sup>674</sup> UNSG Report 2009, Implementing RtoP (n 331), para 8; UNSC Res 1674 (n 563) preambular para 4; UNHRC, 'Prevention of Genocide' (n 563), 4 and African Commission on Human and Peoples' Rights Res 'Strengthening the Responsibility to Protect in Africa' (n 563), para 5.

<sup>675</sup> For e.g. EP Res 'The Situation in Darfur' (n 563), para E and EP Res, 'The Tragic Situation in Burma' (n 563), para 3.

<sup>676</sup> See particularly, UNSC Res 2014 (n 563), preambular para 5 [regarding Yemen]; UNHRC Res S-16/1 (n 415), para 1; UNHRC Res S-15/1 (n 416), para 2; UNSC Res 1970 (n 414), preambular para 9 and UNSC Res 1973 (n 414), preambular para 4.

beneficiaries have not been detailed in the spirit of the Outcome Document's 'populations'<sup>677</sup> beneficiary concept. Instead, reference has been made to secondary RtoP-type measures being authorised in order to protect 'civilians'.<sup>678</sup> This distinction raises some significant questions. On what basis is the international community to determine who requires the most protection from RtoP crimes? What drawbacks, if any, could this entail? The second approach taken to the concept of the beneficiary in international practice can be drawn upon here.

### 3.2.2 Approach Two: The Protected Persons of the RtoP Crime(s) Apprehended

In international practice, the international community has generally determined who specifically merits protection on a case-by-case basis, in accordance with the protected persons of the RtoP crime apprehended in each particular instance. For instance, States and other relevant actors identified RtoP beneficiaries as the "civilian population" (i.e. the protected persons of crimes against humanity) when this crime was perceived to be being committed in, for example, Kenya,<sup>679</sup> Burma,<sup>680</sup> Democratic Republic of Congo,<sup>681</sup> Syria,<sup>682</sup> Libya<sup>683</sup> and the Côte d'Ivoire.<sup>684</sup> This approach appears both legitimate and reasonable. It tries to ensure that RtoP is implemented for the *victims* of the RtoP crimes *being perpetrated* in any *given case*. Furthermore, referring to the established protected persons of mass atrocity crimes under international law is not a new approach to determining the beneficiary of potential international protective action. Indeed, prior to the adoption of the Outcome Document, a number of States<sup>685</sup> linked their discussion of the criminal context in Darfur to

<sup>677</sup> Outcome Document (n 333), paras 138 and 139.

<sup>678</sup> See especially, UNSC Res 1973 (n 414) paras 4-6 [authorising measures in order to "protect civilians"].

<sup>679</sup> Statement of the SAPG cited in UN DPI, 'The United Nations and Kenya: Briefing Note' (n 399), 4.

<sup>680</sup> See for instance, E C Luck, 'Testimony before Subcommittee on International Development, Foreign Assistance, Economic Affairs and International Environmental Protection', Committee on Foreign Relations, U.S. Senate (17 June 2008) cited in Cohen (n 656), 25. (E C Luck, 'Testimony before Subcommittee on International Development, Foreign Assistance, Economic Affairs and International Environmental Protection').

<sup>681</sup> Statement by the Representative of *Belgium* to the UNHRC in UN Press Release, 'Human Rights Council Calls for the Immediate End to all Human Rights Violations in the Democratic Republic of Congo' (1 December 2008)

<<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/E8CCAFBBA4481A51C12575120056D55E?opendocument>> accessed 6 July 2012. (UN Press Release, 'Human Rights Council Calls for the Immediate End to all Human Rights Violations in the Democratic Republic of Congo').

<sup>682</sup> See particularly, 'Statement by the Special Advisers of the United Nations Secretary-General, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria', 2 June 2011 (n 416).

<sup>683</sup> See e.g. Statements of the Representatives of *France*, *Germany* and *Brazil* to the UNSC, UNSC Verbatim Record (February 2011) UN Doc S/PV.6491; Statements of the Representatives of *France*, *Lebanon*, *India* and the *Russian Federation* to the UNSC, UNSC Verbatim Record (March 2011) UN Doc S/PV.6498.

<sup>684</sup> See e.g. Statements of the Representatives of *Gabon*, *Colombia* and the *Côte d'Ivoire* to the UNSC, UNSC Verbatim Record (March 2011) UN Doc. S/PV.6508.

<sup>685</sup> See especially, Statements of the Representatives of the *Russian Federation* and *Brazil* to the UNSC, UNSC Verbatim Record (18 September 2004) UN Doc S/PV/5040 and Statement of the Representative of the *Netherlands on behalf of the European Union* to the UNSC, UNSC Verbatim Record (19 November 2004) UN Doc S/PV/5082.

the protected persons of the crime at issue. Nevertheless, the approach raises significant questions regarding the extent to which RtoP's criminal basis influences the international community's responses to mass atrocity crimes. To some extent, a review of international practice suggests that RtoP's criminal basis may dictate, not just influence, international responses to mass atrocity crimes. To give one example, the (now former) UN Special Adviser to the Secretary-General on RtoP advised that the application of secondary RtoP to the situation in Burma would require the existence of 'murder or extermination committed as part of a widespread or systematic attack against *the civilian population*'.<sup>686</sup> In short, the Special Adviser explicitly drew upon the legal elements of a crime against humanity in order to determine whether secondary RtoP could be applied to the situation and, if so, who its beneficiaries would be (i.e. the "civilian population"). The legal basis of the Special Adviser's approach brings to mind the fact that international reaction to Rwanda is understood to have been partly hindered by debates over whether the legal elements of genocide were actually present.<sup>687</sup> Admittedly there has been no debate in practice to date over whether the members of the population sustaining harm fall within legal understandings of the protected person of the mass atrocity crime apprehended. Nevertheless, relevant actors should perhaps be cautious over the potential for this approach to lead to such arguments in future practice, at least in cases where some actors do not want secondary RtoP to be applied for wider political reasons. Perhaps most significantly, drawing upon the protected person of the RtoP crime apprehended raises important questions about the extent to which secondary RtoP can be discharged to *prevent* these crimes arising in the first place<sup>688</sup> and, furthermore, whether it is possible to maintain an overarching beneficiary concept like "populations".

### 3.2.3 Approach Three: Detail the Specific Characteristics of RtoP Beneficiaries in Each Case

The third approach taken to the concept of the RtoP beneficiary in wider international practice comes through most clearly in the cases of Guinea and the Côte d'Ivoire. With regard to events in Guinea the UN Secretary-General reminded State authorities that they owe primary RtoP to 'all Guineans, regardless of their ethnicity, religion or political

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<sup>686</sup> E C Luck, 'Testimony before Subcommittee on International Development, Foreign Assistance, Economic Affairs and International Environmental Protection' (n 680).

<sup>687</sup> See R Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Arrow Books, London 2004) 343 and 374; L van den Herik, "The Schism Between the Legal and the Social Concept of Genocide in Light of the Responsibility to Protect" in R Henham and P Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate Publishing, Aldershot 2007) 76.

<sup>688</sup> This question is discussed in relation to secondary RtoP's activating threshold in chapter four.

affiliation'.<sup>689</sup> The Secretary-General's Special Advisers adopted a similar approach in relation to Côte d'Ivoire, recalling that the authorities owe RtoP to 'all populations in Côte d'Ivoire, irrespective of their ethnicity, nationality or religion'.<sup>690</sup>

It is unclear what underscored the emergence of this third approach to the beneficiary concept in these cases and at this phase in RtoP's development. What is clear is that this approach to the beneficiary concept has some particularly notable merits. The approach takes into account the specifics of each context and adapts RtoP beneficiaries accordingly, thereby retaining the *flexibility* of the second (above) approach that has been taken in international practice to date. For example, the approach took into account the *political* basis to events in Guinea by specifying that populations should be protected regardless of their '*political affiliation*'.<sup>691</sup> Similarly, the *ethnically* motivated events in Côte d'Ivoire led to the Special Advisers specifying that populations should be protected irrespective of their '*ethnicity*'.<sup>692</sup> In doing so, this approach tailors the concept of the RtoP beneficiary to the specific members of the population who are most at risk of RtoP crimes.

In addition, the approach seems to circumvent some of the tensions which have arose with respect to the formulation of a beneficiary concept in the field of minority protection. The debates surrounding the formulation and enforcement of Article 27 of the ICCPR can be drawn upon here. The Article provides that it is to apply '[i]n those States in which ethnic, religious or linguistic minorities exist'.<sup>693</sup> This has served to act as an invitation to States to demonstrate that they do not in fact have such groups within their territories<sup>694</sup>. France for example has argued that it does not have "minorities" because it affords equality to all members of its society<sup>695</sup> and is, therefore, *culturally homogenous*.<sup>696</sup> Thus, specifying that protection should be given to groups which have particular characteristics essentially leaves

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<sup>689</sup> UN Press Release, 'Statement attributable to the Spokesperson for Secretary-General on Guinea' (3 November 2010) <<http://www.responsibilitytoprotect.org/index.php/crises/185-crisis-in-guinea/3046-secretary-general-ban-ki-moon-statement-attributable-to-the-spokesperson-for-secretary-general-on-guinea>> accessed 12 May 2012. ('Statement attributable to the Spokesperson for Secretary-General on Guinea').

<sup>690</sup> 'UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire', 29 December 2010 (n 411) and 'Statement attributed to the UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire', 19 January 2011 (n 411).

<sup>691</sup> 'Statement attributable to the Spokesperson for Secretary-General on Guinea' (n 689).

<sup>692</sup> 'UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire', 29 December 2010 (n 411), emphasis added and 'Statement attributed to the UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire', 19 January 2011 (n 411).

<sup>693</sup> ICCPR (n 386) art 27.

<sup>694</sup> On this issue, see especially P Thornberry, 'Is There A Phoenix In The Ashes? International Law and Minority Rights' (1980) 15 Tex Int'l L. J 421, 448.

<sup>695</sup> Shelton argues that '[i]n effect, such reservations amount to a denial that minority groups exist because all individual are treated with equal rights and freedom. No allowance is made for cultural diversity and the right to be different'. D Shelton, 'The UN Human Rights Committee's Decisions' (2004-2005) 12 (2) Human Rights Dialogue <[http://www.carnegiecouncil.org/resources/publications/dialogue/212/section\\_3/5151.html](http://www.carnegiecouncil.org/resources/publications/dialogue/212/section_3/5151.html)> accessed 14 May 2012.

<sup>696</sup> H Hannum "The Concept and Definition of Minorities" in M Weller (ed), *Universal Minority Rights* (OUP, Oxford 2007) 50-51.



States with the discretion over who those groups are in their territory and, indeed, whether it has the groups in its territory at all. Arguably, the approach taken to the concept of the RtoP beneficiary avoids similar implications arising because it specifies that protection should be granted to *all* sections of the population in the State,<sup>697</sup> merely *including* those groups which have particular characteristics. The presumption that such groups exist within the State is therefore made by relevant international actors, irrespective of whether the State recognises such groups or not.

### 3.2.4 The Concept of the Beneficiary in International Practice: General Findings

The varying approaches taken to the beneficiary concept in international practice call into question whether it is possible to maintain a general term for RtoP beneficiaries, such as “populations”. For example, the tendency in international practice to distinguish between the beneficiaries of primary RtoP and secondary RtoP is interesting because no such distinction was made in the Outcome Document. The merits of not doing so are relatively clear. At a conceptual level, providing for an overarching beneficiary concept which spans the range of the RtoP framework ensures *consistency* and *clarity* for a decision over who the beneficiaries should be. At a policy level, an overarching beneficiary concept is consistent with the Outcome Document providing for States<sup>698</sup> and the international community to apply primary and secondary RtoP in order to prevent RtoP crimes from arising.<sup>699</sup> After all, a “populations” beneficiary concept represents a suitable guideline for who should be able to access the benefits of *preventive* strategies because it would be difficult to determine who would be most need of protection in cases where RtoP crimes had not yet become apparent and, therefore, no immediately recognisable ‘victims’<sup>700</sup> to identify as RtoP beneficiaries.

Notwithstanding this, the suitability of an overarching beneficiary concept becomes less compelling when we consider that secondary RtoP also requires the UNSC to authorise non-peaceful responsive measures when RtoP crimes are being, or are about to be, committed. In cases where the international community are applying secondary RtoP in response to harm *already* sustained and, therefore, where it has become apparent who is most need of protection, there is the question of whether it would be more suitable to delineate the

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<sup>697</sup> For e.g. ‘*all* Guineans’ and ‘*all populations* in the Côte d’Ivoire’, ‘Statement attributable to the Spokesperson for Secretary-General on Guinea’ (n 689). See also, ‘UN Secretary-General’s Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d’Ivoire’, 29 December 2010 (n 411) and ‘Statement attributed to the UN Secretary-General’s Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d’Ivoire’, 19 January 2011 (n 411).

<sup>698</sup> Outcome Document (n 333), para 138.

<sup>699</sup> Outcome Document, *ibid*, para 139.

<sup>700</sup> EP Res, ‘Tragic Situation in Burma’ (n 563), para ‘K’.

beneficiaries of secondary RtoP in a more specific manner than the ‘populations’<sup>701</sup> beneficiary concept permits. In turn, relevant actors may recognise beneficiaries under the more comprehensive term of “populations” in cases where the criminal context has not yet become apparent.

## Conclusion

Through a comprehensive examination of the meanings which have been given to the terms “State”, “national authorities”, “international community” and “populations” in relevant practice, the chapter argued that RtoP’s bearer and beneficiary concepts may yet be *evolving* and more nuanced and complex than we perhaps expected following their consensus acceptance by States seven years ago.<sup>702</sup>

Whilst contouring the primary RtoP bearer concept as that owed by “States” and “national authorities” is consistent with a variety of existing international instruments, the legal meaning of these terms can mean that the primary RtoP bearer is *context dependent*. In territories which have not been recognised to meet the requirements of statehood, the concept of the bearer becomes less clear. In situations of Occupation, the Israel-Gaza conflict<sup>703</sup> raises the possibility that the primary RtoP bearer concept may become diffuse, falling on both the Occupying Power and the authorities in effective control of the Occupied Territory. In cases of secessionist enclaves, the Russia-Georgia conflict suggests that a third State cannot claim to be the primary RtoP bearer in the enclave until they are in a position of effective control in the territory.<sup>704</sup> The territorial link between bearer and beneficiary in these cases reinforces this writer’s argument that a review of the Outcome Document’s drafting history suggests that the primary RtoP bearer concept was intended to be territorially defined.

On the one hand, the variations in practice suggest that the primary RtoP bearer concept has shown in practice that it is *versatile* and capable of meeting *political realities*, in spite of the potential vacuum in protection that could have emerged as a result of the Outcome Document’s use of legally defined terms like “State” and “national authorities”. Conversely, the way in which the concept has stood up to demands for it to be adapted pursuant to a variety of different territorial arrangements could be controversial. This includes the possibility that, whilst the recognition of a State’s “national authorities” has not been entirely

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<sup>701</sup> Outcome Document (n 333), paras 138 and 139.

<sup>702</sup> Outcome Document, *ibid*.

<sup>703</sup> UNHRC, ‘Report of the UN Fact Finding Mission on the Gaza Conflict’ (n 359), 520.

<sup>704</sup> Statements of the Representatives of the *United Kingdom* and *United States* to the UNSC, UNSC Verbatim Record (19 August 2008) UN Doc S/PV.5969.

synonymous with government recognition, the two can be indirectly concurrent in some instances. This could serve to reinforce a link between the RtoP framework and externally influenced regime change.

Examination of State views on the scope of the “international community” concept used in the Outcome Document suggests that a wide range of actors are considered be integral members of the “international community” and, therefore, those who have a fundamental role in discharging secondary RtoP.<sup>705</sup> As there is limited support for the possibility that any member of the “international community” bears secondary RtoP as a responsibility in its own right, the chapter proposed that the “international community” concept may not have been formulated as an absolute bearer concept but, instead, may be better understood as shorthand for the range of actors who can discharge secondary RtoP. This writer argued that an “actors” approach to secondary RtoP may entail the drawback of reinforcing the UNSC’s discretion over whether a situation represents a threat to international peace and security and, therefore, warrants the application of Chapter VII enforcement measures. However, the approach also allows for secondary RtoP to be discharged with greater flexibility.

Examination of the beneficiary concept in State views suggests that there may be a preference among some States to limit RtoP beneficiaries to particular sections of States’ populations, specifically those with citizenship,<sup>706</sup> civilians status<sup>707</sup> or a recognised right to self-determination.<sup>708</sup> Arguably, significant implications could arise, should either of these beneficiary concepts take hold in practice. Primarily, a “citizens”, “civilians” or “people”

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<sup>705</sup> Statements of the Representatives of *Japan, Switzerland, Singapore, Cameroon, South Africa, Pakistan and Chile* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statements of the Representatives of *Iceland, Cameroon, Benin and Slovakia* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statement of the Representative of *Egypt (on behalf of the Non-Aligned Movement)* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97; Statement of the Representative of *Lesotho and Azerbaijan* to the UNGA in UN Press Release, ‘Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate’ (n 475); Statement of the Representative of *Norway* to the UNGA in UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 489); Statement of the Representative of *Brazil* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

<sup>706</sup> For e.g. Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5319; Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (November 2007) UN Doc S/PV/578; Statement of the Representative of *Sri Lanka* to the UNSC, UNSC Verbatim Record (December 2009) UN Doc S/PV/6216(Res.1); Statement of the Representative of *Myanmar* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100. All State views referring to “citizens” are detailed in Annex II (B) (c).

<sup>707</sup> For e.g. Statement of the Representative of *Armenia* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7; Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (June 2005) UN Doc S/PV/5209; Statement of the Representative of *Nepal* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5319; Statement of the Representative of *Ghana* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476; Statement of the Representative of *Canada* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statement of the Representative of *Egypt (on behalf of the Non-Aligned Movement)* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97. All State views referring to “civilians” are detailed in Annex II (B) (b).

<sup>708</sup> For e.g. Statements of the Representatives of *Estonia, Monaco and Iceland* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.6; Statement of the Representative of *Indonesia* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7; Statement of the Representative of *Bangladesh* to the UNSC, UNSC Verbatim Record (January 2009) UN Doc S/PV/6066(Res.1). All State views referring to “peoples” are detailed in Annex II (B) (d).



beneficiary concept could unduly narrow or widen the RtoP framework. With regard to the former, the chapter argued that the adoption of, for example, a “civilians” beneficiary concept could hinder (i) RtoP’s discharge through means which focus upon persons engaged in hostilities (e.g. child soldiers<sup>709</sup>); and (ii) limit RtoP’s application to grave breaches of the laws of war, not war crimes per se.<sup>710</sup> In relation to the potentially *expansive* effect of the proposed beneficiary concepts, reference was made to the risk that a “citizens” concept could encourage some States, particularly Kin States like Russia, to invoke the RtoP framework to justify action in order to “protect” their citizens residing in the territory of another State.<sup>711</sup> Moreover, a “civilians”, “citizens” or “people” beneficiary concept could create conflicts between the RtoP framework and some of the fundamental existing obligations to which it relates. A principal example is the potential for a “people” beneficiary concept to potentially impinge upon the general consensus in the human rights context that no remedial right to self-determination exists.<sup>712</sup>

Although the Outcome Document “populations” beneficiary concept has been upheld in international instruments which affirm the RtoP framework generally,<sup>713</sup> in country-specific practice the international community has typically identified the beneficiaries of secondary RtoP measures pursuant to the protected persons of the international crimes that RtoP covers.<sup>714</sup> On the one hand, this can facilitate the beneficiary concept to be tailored to the specific sections of the population who are at most risk in each case and legitimise the action taken by certain actors (e.g. the UNSC). On the other hand, we should perhaps be cautious over the prospect for this approach to cause legalistic debates over whether the population sustaining harm falls within the protected person of the mass atrocity crime apprehended, at least in cases where secondary RtoP’s application would impact upon the broader political interests of some States. In light of this, the chapter proposed that the approach to the beneficiary concept which has been adopted in more recent practice could be a more viable approach. By specifying that all sections of States’ populations are protected, irrespective of

<sup>709</sup> UNSG Report 2009, Implementing RtoP (n 331), 16 and 17.

<sup>710</sup> Statement of the Acting Representative of the *United States* to the UNGA, ‘US Proposals for UN Reform’ (n 596) and Letter of the US Ambassador John Bolton to the UNGA President (n 602).

<sup>711</sup> “Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC” (n 365). See generally, Kemp, Popovski and Thakur (n 368).

<sup>712</sup> Gray, *International Law and the Use of Force* (n 624), 64.

<sup>713</sup> See especially: UNSG Report 2009, Implementing RtoP (n 331), para 8; UNSC Res 1674 (n 563), preambular para 4; UNHRC, ‘Prevention of Genocide’ (n 563), 4 and African Commission on Human and Peoples’ Rights Res ‘Strengthening the Responsibility to Protect in Africa’ (n 563), para 5.

<sup>714</sup> See for e.g. Statement of the SAPG cited in UN DPI, ‘The United Nations and Kenya: Briefing Note’ (n 399), 4; Statement by the Representative of *Belgium* to the UNHRC in UN Press Release, ‘Human Rights Council Calls for the Immediate End to all Human Rights Violations in the Democratic Republic of Congo’ (n 681); ‘Statement by the Special Advisers of the United Nations Secretary-General, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria’, 2 June 2011 (n 416); Statements of the Representatives of *France*, *Germany* and *Brazil* to the UNSC, UNSC Verbatim Record (February 2011) UN Doc S/PV.6491; Statement of the Representatives of *France*, *Lebanon*, *Russian Federation*, *India* and *Colombia* to the UNSC, ‘The Situation in Libya’ March 2011, UN Doc S/PV.6498; Statements of the Representatives of *Gabon*, *Colombia* and the *Côte d’Ivoire* to the UNSC, UNSC Verbatim Record (March 2011) UN Doc S/PV.6508.

objective factors like ethnicity and political affiliation, this approach does not appear to entail the same difficulties which arose in relation to the overly specific beneficiary concept used in Article 27 of the ICCPR.<sup>715</sup>

In conclusion, the chapter has illustrated the extent to which RtoP was designed to *fit within* the existing international framework. The bearer concept reinforces the territorial and State-centric bearer concepts used in existing human rights and humanitarian law instruments.<sup>716</sup> An “actors” approach reinforces the vested interest which a range of actors have in protecting populations from mass atrocity crimes and, furthermore, the UNSC’s discretion over whether or not to recognise that a situation warrants the application of Chapter VII measures. Perhaps to the detriment of its maintenance in subsequent practice, the beneficiary concept formulated at the World Summit upholds the understanding that, irrespective of the way in which a human being behaves toward others, human rights are universal. Furthermore, practice regarding the concepts has served to strengthen trends in wider practice, including the fact that there can be concurrent governments in one State and that legitimacy, protection and external recognition are often considered to be mutually dependent.

Whilst the concepts of bearer and beneficiary may be considered to be issues which pertain solely to the merits of a doctrine *on paper*, they can have a significant impact *in practice* at both a policy and legal level.<sup>717</sup> Their potential impact reinforces the need for commentators and relevant actors, like States and the UNSG, to more deeply engage with the finer aspects of the RtoP framework like its bearer and beneficiary concept. In the interim, the chapter raises significant questions which merit close reflection in the next chapter. What is the scope and character of “States” duties under primary RtoP? What value, if any, does primary RtoP add to the existing obligations to which it relates? In what ways, if at all, can “States” compliance with the primary RtoP duty be monitored and enforced?

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<sup>715</sup> ICCPR (n 386) art 27. See further, Hannum “The Concept and Definition of Minorities” (n 696), 50-51 and Thornberry, ‘Is There A Phoenix In The Ashes?’ (n 694), 448.

<sup>716</sup> UN Human Rights Committee, ‘General Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant’ (n 387); *Al Skeini & Others v. The United Kingdom, 2011* (n 387) para 74 and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (n 388).

<sup>717</sup> The question of how to move forward from present approaches to RtoP’s bearer and beneficiary concepts is discussed at length in chapter seven.

## CHAPTER III

### PRIMARY RtoP: OLD POLICIES, NEW PACKAGE?

#### Introduction

This chapter examines primary RtoP's substance and enforcement,<sup>718</sup> drawing particularly upon the way in which primary RtoP has been approached in State<sup>719</sup> and international practice to date. Particular emphasis is placed upon the UN Secretary-General's [UNSG] 2009 Report on Implementing RtoP<sup>720</sup> which provides perhaps the most detailed guidance on primary RtoP's scope and character to date. Where appropriate, the chapter draws upon wider international law, particularly the field of minority protection, to provide a possible rationale for primary RtoP's development in practice or suggest possible implications thereof.

Parts one and two consider primary RtoP's substance. Part one draws upon the way in which primary RtoP has been addressed in practice to date in order to chart the *principal* means through which States can implement primary RtoP and, furthermore, identify potential impediments to the use of particular means in some cases. Part two outlines and examines general findings regarding primary RtoP's substance. A number of significant questions are addressed, including what rationale underscores providing for primary RtoP implementation means to vary from *context to context*? What is the duration of the primary RtoP duty? Does primary RtoP endure or suspend at particular stages in a crisis? Does secondary RtoP's activation mean that a State's primary RtoP duties become obsolete? Or, alternatively, can primary and secondary RtoP be implemented concurrently? The complex relationship between primary RtoP and the existing obligations which it subsumes is also discussed, including whether primary RtoP *adds value* to States' existing protective obligations. For example, does primary RtoP add value by *clarifying* the *specific requirements* of rights/obligations in an RtoP context? Is there therefore scope to argue that primary RtoP has the same utility as instruments which developed upon the fundamental human rights provided by the International Bill of Rights<sup>721</sup> in specific contexts, such as the

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<sup>718</sup> To recall, chapter one outlined that the provisional lines of the Outcome Document relate to primary RtoP, providing: '[e]ach individual State' owes primary RtoP to has its populations from 'RtoP crimes; and (ii) that this 'responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means'. UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 138. (Outcome Document).

<sup>719</sup> This includes a review of over four hundred State views on RtoP. Surveyed States views are detailed in Annex I (a)-(i).

<sup>720</sup> Report of the UNSG, 'Implementing the Responsibility to Protect' (12 January 2009) UN Doc. A/63/677. (UNSG Report 2009, Implementing RtoP).

<sup>721</sup> That is: (i) UNGA Res 217A (III), 'Universal Declaration of Human Rights' (1948) UN Doc A/810; (ii) International Covenant on Civil and Political Rights (1966) (adopted 16 December 1966, entered into force 23

Convention on the Elimination of Discrimination against Women and the Declaration on the Rights of Indigenous Peoples?

Part three reviews the merits and demerits of existing proposals for monitoring and enforcing State compliance with primary RtoP. This writer outlines the potential implications of some of these proposals, ranging from a lack of support among States to the more profound policy implications of specific proposals, such as the risk of further politicisation of the UN Human Rights Council [UNHRC].

## 1 The Scope of Primary RtoP

Two Outcome Document provisions relate to primary RtoP's scope, specifically that (i) primary RtoP requires States to prevent RtoP crimes,<sup>722</sup> and (ii) States can discharge primary RtoP through 'appropriate and necessary means'.<sup>723</sup> These provisions suggest that primary RtoP formulates both negative and positive duties. After all, a responsibility to prevent RtoP crimes from arising would lack meaning if States were not obligated to refrain from inciting, ordering, soliciting, aiding or abetting RtoP crimes.<sup>724</sup> Equally, a preventive responsibility would lack meaning if States were not obligated to take steps to protect populations from the perpetration of RtoP crimes by State or non-State actors. This quite likely underscores why the Outcome Document also provides for States primary RtoP duties to have a positive character, requiring States to implement primary RtoP through 'appropriate and necessary means'.<sup>725</sup> Notably, the Outcome Document does not explain *which* means are 'appropriate and necessary'.<sup>726</sup> However, subsequent practice has helped to clarify the kind of means which States can use in order to comply with their negative and positive primary RtoP duties.

### 1.1 The Negative Duty

A recurrent theme in relevant practice at the international and regional level is that primary RtoP's fulfilment requires State actors to refrain from perpetrating, or further perpetrating,

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March 1976) 999 UNTS 171 (ICCPR); and (iii) International Covenant on Economic, Social and Cultural Rights 1966 (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR). On the formulation of the International Bill of Rights and the debates surrounding this, see e.g. T D Musgrave, *Self-Determination and National Minorities* (OUP, Oxford 1997) 66-68.

<sup>722</sup> Outcome Document (n 718), para 138.

<sup>723</sup> Outcome Document, *ibid*.

<sup>724</sup> The modes of liability for the type of mass atrocity crimes that RtoP covers are detailed in Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 art 25 (3). (Rome Statute).

<sup>725</sup> Outcome Document (n 718), para 138.

<sup>726</sup> Outcome Document, *ibid*.

RtoP crimes. A principal way in which to fulfil primary RtoP is therefore for State actors to ‘first do no harm’.<sup>727</sup> At the international level, this element of primary RtoP comes through in a range of the country-specific contexts in which primary RtoP has been invoked. Libya,<sup>728</sup> Syria<sup>729</sup> and Yemen<sup>730</sup> are particularly useful illustrations.

In Libya, the UNHRC expressed ‘deep concern with the situation in Libya’<sup>731</sup> and, noting that some of the human rights violations ‘may also amount to crimes against humanity’,<sup>732</sup> urged ‘the Government of Libya to meet its responsibility to protect its population, to immediately put an end to all human rights violations’<sup>733</sup> and ‘to stop any attacks against civilians’.<sup>734</sup> The UNHRC adopted a similar approach to Syrian national authorities’ primary RtoP duty when establishing a fact-finding mission to examine the ‘violations *and crimes* committed’<sup>735</sup> in the State. Condemning the Syrian authorities ‘use of lethal violence against peaceful protestors and hindrance to access of medical treatment’,<sup>736</sup> the UNHRC urged the Syrian authorities to ‘immediately put an end to all human rights violations, protect its population and respect fully all human rights and fundamental freedoms’.<sup>737</sup> In Yemen, the UN Security Council [UNSC] expressly recalled the Yemeni authorities’ primary RtoP duty.<sup>738</sup> The UNSC also alluded to the possibility that the authorities may be perpetrating war crimes and, therefore, failing to comply with the negative primary RtoP duty. To this end, the UNSC demanded that the Yemeni authorities immediately ‘ensure their actions comply with obligations under applicable international humanitarian and human rights law’<sup>739</sup> and ‘take action to end attacks against civilians and civilian targets by security forces’.<sup>740</sup>

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<sup>727</sup> This phrase was used by the ICISS to refer to one of the basis obligations of those using armed force in response to RtoP crimes but, in the view of this writer, it bears equal relevance in the context of the primary RtoP duty. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, Ottawa 2001) 31. (ICISS Report).

<sup>728</sup> UNHRC Res S-15/1, ‘The Situation of Human Rights in the Libyan Arab Jamahiriya’ (25 February 2011) UN Doc A/HRC/S-15/1, para 2 (UNHRC Res S-15/1); UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, preambular para 9 (UNSC Res 1970) and UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, preambular para 4 (UNSC Res 1973).

<sup>729</sup> UNHRC Res S-16/1, ‘The Current Human Rights Situation in the Syrian Arab Republic in the Context of Recent Events’ (29 April 2011) UN Doc A/HRC/RES/S-16/1, para 1. (UNHRC Res S-16/1).

<sup>730</sup> UNSC Res 2014 (21 October 2011) UN Doc S/RES/2014. (UNSC Res 2014).

<sup>731</sup> UNHRC Res S-15/1 (n 728), para 1.

<sup>732</sup> UNHRC Res S-15/1, *ibid*.

<sup>733</sup> UNHRC Res S-15/1, *ibid*, para 2.

<sup>734</sup> UNHRC Res S-15/1, *ibid*.

<sup>735</sup> UNHRC Res S-16/1 (n 729), para 7.

<sup>736</sup> UNHRC Res S-16/1, *ibid*, para 1.

<sup>737</sup> UNHRC Res S-16/1, *ibid*.

<sup>738</sup> UNSC Res 2014 (n 730), preambular para 14.

<sup>739</sup> UNSC Res 2014, *ibid*, para 5.

<sup>740</sup> UNSC Res 2014, *ibid*.

## 1.2 Positive Duties

Relevant UN guidance<sup>741</sup> and State views<sup>742</sup> suggest that primary RtoP's fulfilment can require national authorities to take a variety of steps in order to protect their populations from the incitement or perpetration of RtoP crimes by State or non-State actors. The practice in this area can be divided into two categories. The first category regards the most general measures which national authorities can apply in order to comply with primary RtoP. General implementation measures can be largely understood as those which involve States taking steps to give effect to the three broad categories of obligations which primary RtoP interconnects with, namely human rights, humanitarian and criminal law. The second category develops upon the former, including recommendations which help to clarify the steps that national authorities can take in order to give effect to existing humanitarian, human rights and criminal law obligations for the specific purpose of preventing and protecting populations from RtoP crimes. Each category merits reflection.

### 1.2.1 General Implementation Measures

To date, the main recommendation which has been made regarding this category of implementation measures is for States to ratify relevant international instruments, such as those relating to international humanitarian<sup>743</sup> and criminal<sup>744</sup> law. With the exception of encouraging States to cooperate with the International Criminal Court [ICC],<sup>745</sup> relevant actors have generally not specified the particular instruments that States should consider ratifying. However, the present author would argue that States should consider adopting

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<sup>741</sup> UNSG Report 2009, Implementing RtoP (n 720), 11 and 12.

<sup>742</sup> Surveyed State views are detailed in Annex I (a)-(i).

<sup>743</sup> For e.g. UNSG Report 2009, Implementing RtoP (n 720), 11; Statements of the Representatives of *France* and the *Republic of Korea* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97; Statement of the Representative of *Argentina* to the UNGA in UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (28 July 2009) UN Doc GA/10850 <<http://www.un.org/News/Press/docs/2009/ga10850.doc.htm>> accessed 16 June 2012 and Statements of the Representatives of the *Czech Republic* and *Canada* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

<sup>744</sup> See e.g. UNSG Report 2009, Implementing RtoP, *ibid*, 10. The following statements welcomed this suggestion: Statements of the Representatives of *Bolivia*, *Norway*, *Slovenia*, *Croatia* and *Turkey* to the UNGA in UN Press Release, 'More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (24 July 2009) UN Doc GA/10849 <<http://www.un.org/News/Press/docs/2009/ga10849.doc.htm>> accessed 17 June 2012 (UN Press Release, 'More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect'); Statements of the Representatives of *Kenya*, *Argentina* and *Azerbaijan* to the UNGA in UN Press Release, 'Delegates Weigh Legal Merits on Responsibility to Protect Concept as General Assembly Concludes Debate', *ibid*; Statements of the Representatives of *France*, *Italy*, *Bosnia & Herzegovina* and the Joint Statement of the Representatives of *Costa Rica* and *Denmark* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97; Statements of the Representatives of *Japan* and *Switzerland* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 and Statements of the Representatives of *Slovakia* and *Botswana* to the UN General Assembly, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

<sup>745</sup> See particularly, UNSG Report 2009, Implementing RtoP, *ibid*, 11-12.

those instruments which most directly interact with the nature of the four crimes that primary RtoP requires States to prevent. This writer considers that some of the most obvious instruments for State ratification include the Genocide Convention,<sup>746</sup> Additional Protocols to the Geneva Conventions and Rome Statute.<sup>747</sup> State ratification of some perhaps less obvious instruments could add *substance* and *depth* to State efforts to prevent RtoP crimes. Consideration could be given to strengthening the implementation of minority rights, not least because of the overlap between the crime of genocide and minorities' right to existence<sup>748</sup> and, furthermore, the interplay between cultural minority rights and the fact that humanitarian law prohibits damage to cultural property.<sup>749</sup> Given that torture can amount to a crime against humanity, the Torture Convention is another example.<sup>750</sup> In view of the interplay between discrimination and the recognition of persecution, extermination and the forcible transfer or deportation of a population as crimes against humanity,<sup>751</sup> consideration may also be given to ratifying instruments regarding the right to non-discrimination, such as the International Covenant on Civil and Political Rights,<sup>752</sup> Convention on the Elimination of All Forms of Racial Discrimination<sup>753</sup> and the Convention on the Elimination of Discrimination against Women.<sup>754</sup> States may also consider strengthening their commitment, or acceding to, instruments for the protection of refugees and internally displaced persons,<sup>755</sup>

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<sup>746</sup> Convention on the Prevention and Punishment of the Crime of Genocide 1948 (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

<sup>747</sup> Rome Statute (n 724).

<sup>748</sup> On minorities right to existence see UNGA Res 47/135, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities' (18 December 1992) UN Doc A/RES/47/135 art 1 (1) (UNGA, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities'). For a discussion of the nexus between the right to existence and/or life and the crime of genocide, see generally W A Schabas, *Genocide in International law* (CUP, Cambridge 2000) 107 and J Rehman, *International Human Rights Law* (Pearson, Harlow 2003) 438–452.

<sup>749</sup> See respectively, ICCPR (n 721) art 27; UNGA, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities', *ibid*; Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 and Rome Statute (n 724) arts 8 (2) (b), (ix) and (e) (iv).

<sup>750</sup> See respectively: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 and Rome Statute, *ibid*, art 7 (f).

<sup>751</sup> See respectively, Rome Statute, *ibid*, arts 7 (h), (b) and (d); UNGA Res 2106 (XX), 'International Convention on the Elimination of All Forms of Racial Discrimination' (21 December 1965) UN Doc A/RES/2106(XX). (Convention on the Elimination of All Forms of Racial Discrimination).

<sup>752</sup> ICCPR (n 721).

<sup>753</sup> Convention on the Elimination of All Forms of Racial Discrimination (n 751).

<sup>754</sup> Convention on the Elimination of All Forms of Discrimination against Women (1979) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13. (CEDAW).

<sup>755</sup> These include the Convention Relating to the Status of Refugees (1951) (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 and the UN ESCOR Human Rights Committee, 'Guiding Principles on Internal Displacement' (1998) UN Doc E/CN.4/1998/53/Add.2. On these instruments and their effectiveness, see generally A Guterres, 'Millions Uprooted: Saving Refugees and the Displaced' (2008) 87 (5) *Foreign Aff.* 90 and N Geissler, 'The International Protection of Internally Displaced Persons' (1999) 11 (3) *International Journal of Refugee Law* 451. For a discussion of these instruments, their role in RtoP contexts and proposals on the way in which the RtoP framework could develop to strengthen their implementation, see especially R Cohen, 'Reconciling RtoP with IDP Protection' (2010) 2 *GRtoP* 15; The Editors, 'Special Issue for GRtoP: Protecting IDPs and Refugees' (2010) 2 *GRtoP* 5, 7 and E Mooney, 'Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts Between RtoP and IDP Protection' (2010) 2 *GRtoP* 60.

not least because (i) a State should take into account its duty to prevent RtoP crimes under the principle of non-refoulement by reason of the fact that primary RtoP extends to all members of a State's population, including refugees at risk of RtoP crimes in a third State;<sup>756</sup> and (ii) internally displaced persons can easily become the victims of RtoP crimes due to their dependency on national authorities for permitting and regulating their safe access to food, water and medicine.<sup>757</sup> The latter point suggests that consideration should also be given to ratification of the International Covenant on Economic, Social and Cultural Rights<sup>758</sup> which provides for the right to adequate food and water<sup>759</sup> and healthcare.<sup>760</sup>

### 1.2.2 Specific Implementation Measures

The specific means of implementing primary RtoP are essentially of a humanitarian,<sup>761</sup> human rights<sup>762</sup> and criminal law<sup>763</sup> character. Each merits reflection.

#### *(i) Human Rights Measures*

A significant question regarding human rights measures is whether all human rights bear equal significance under primary RtoP implementation strategies or, alternatively, whether some carry more importance when seeking to protect a population from RtoP crimes? A

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<sup>756</sup> This was explored in chapter two in relation to the concept of the beneficiary of RtoP.

<sup>757</sup> On the particularly vulnerable position of internally displaced persons, including relevant statistics, see particularly Mooney (n 755), 60-64.

<sup>758</sup> ICESCR (721).

<sup>759</sup> This is provided under the right to an adequate standard of living. ICESCR, *ibid*, art 11.

<sup>760</sup> ICESCR, *ibid*, art 12.

<sup>761</sup> This comes through in, for example, EP Res, 'Expulsions of NGOs from Darfur' (12 March 2009) EP Doc P6\_TA(2009)0145 at paras 3 and F (EP Res, 'Expulsions of NGOs from Darfur') and EP Res, 'The Tragic Situation in Burma' (22 May 2008) EP Doc P6\_TA(2008)0231 at paras 5 and K (EP Res, 'The Tragic Situation in Burma').

<sup>762</sup> See generally, UNSG Report 2009, Implementing RtoP (n 720), 5, 6 and 11; See also the Statement of the Representative of *Mali* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statements of the Representatives of *France*, *Sweden (on behalf of the European Union)* and *Bosnia and Herzegovina* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97; Statement of the Representative of *Hungary* to the UNGA in UN Press Release, 'More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (n 744); Statement of the Representative of *Jamaica (on behalf of CARICOM)* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

<sup>763</sup> See generally, UNSG Report 2009, Implementing RtoP (n 720), 12 [speaking mainly of States becoming parties to the Rome Statute as one way of helping to ensure that there is not impunity for mass atrocity crimes]. See also, Statement of the Representative of *Japan* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statement of the Representative of *Tanzania* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statements of the Representatives of *Turkey* and *Slovenia* to the UNGA in UN Press Release, 'More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect', *ibid* [examples of States speaking of fulfilling primary RtoP by taking steps to establish the rule of law domestically]; Statement of the Representative of *Colombia* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 and Joint Statement of *Denmark and Costa Rica* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 [examples of States speaking of fulfilling primary RtoP by taking steps to ensure the proper functioning of domestic law enforcement, judicial systems and security sectors].



number of States are on record as stating that States should implement the rights of women,<sup>764</sup> refugees<sup>765</sup> and minorities<sup>766</sup> in order to comply with primary RtoP. In addition, other relevant actors have attached particular importance, albeit sometimes indirectly, to States implementing the right to non-discrimination,<sup>767</sup> women's rights<sup>768</sup> and children's rights<sup>769</sup> effectively. Reference to the aforementioned specific rights suggests, if only implicitly, that certain rights may have particular bearing within an RtoP context. This writer would argue that certain rights have been given particular importance because they interconnect with the *nature of the acts* which can constitute *RtoP crimes*.<sup>770</sup> Accordingly, implementing certain rights effectively may help national authorities to comply with their primary responsibility to prevent RtoP crimes from arising. Indeed, the Outcome Document of the Durban Review Conference provides that:

‘[R]acism, racial discrimination, xenophobia and related intolerance are still among the root causes of armed conflict and very often one of its consequences and deplores the occurrences of armed conflicts as well as ethnic or religious violence, and notes relevant provisions of the 2005 World Summit outcome, in particular paragraphs 138 and 139’.<sup>771</sup>

The above provision associates primary and secondary RtoP with the right to non-discrimination by reason of the fact that violations of this right can often underscore the emergence of RtoP crimes. The rights of children and women are also particularly good illustrations of this rationale.

State compliance with children's rights is a recurrent theme throughout the UNSG's proposals for primary RtoP's implementation. Reference is made to a number of steps which

<sup>764</sup> Statement of the Representative of *Swaziland* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV. 100.

<sup>765</sup> Refugees have only been expressly detailed as RtoP beneficiaries by the Representative of Greece. Statement of the Representative of *Greece* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV/5476. However, the Representative of *Swaziland* directed that RtoP clearly encompasses an ‘obligation to protect immigrating populations’. Statement of the Representative of *Swaziland* to the UNGA, *ibid*. Furthermore, Chile expressed a willingness to provide RtoP benefits to so-called “foreigners”. See Statement of the Representative of *Chile* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

<sup>766</sup> Statement of the Representative of *Holy See* to the UNGA in UN Press Release, ‘Delegates Weigh Legal Merits on Responsibility to Protect Concept as General Assembly Concludes Debate’ (n 744); Statements of the Representatives of *Slovenia* and *Croatia* to the UNGA in UN Press Release, ‘More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 743); Joint Statement of the Representatives of *Denmark* and *Costa Rica* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 and Statement of the Representative of *Swaziland* to the UNGA, *ibid*.

<sup>767</sup> UNSG Report 2009, Implementing RtoP (n 720), 10.

<sup>768</sup> UNSG Report 2009, Implementing RtoP, *ibid*, 11, 12 and 14.

<sup>769</sup> UNSG Report 2009, Implementing RtoP, *ibid*, 11 and 14.

<sup>770</sup> On the use of international human rights law to prevent RtoP crimes, see for instance P Akhavan, ‘Preventing Genocide: Measuring Success by What Does Not Happen’ (2011) 22 (1) *Crim. L. F.* 1, 12. On the connection between the effective implementation of international human rights law and the prevention of the mass atrocity crimes that RtoP relates to, see B Harff, ‘No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Mass Murder since 1955’ (2003) 97 (1) *A. P. S. Rev.* 57, 72.

<sup>771</sup> UN OHCHR, ‘Outcome Document of the Durban Review Conference’ (24 April 2009), para 14 <<http://www.unhcr.org/refworld/docid/49f584682.html>> accessed 17 June 2012.

national authorities could take, either independently or with the assistance of a relevant organisation/third State, to either (i) safeguard the child from RtoP crimes; or (ii) to protect the population from RtoP crimes perpetrated by children. In light of this, the steps tend to focus on protecting children who have participated in hostilities in the State or on preventing children from re/participating in hostilities in the State.

Notably, the UNSG's proposals on children's rights are largely framed as examples of global best practice, thereby suggesting that relevant States should consider drawing upon existing practice when developing strategies for compliance with primary RtoP. The examples given include (i) Sierra Leone's rehabilitation and reintegration programmes for child soldiers;<sup>772</sup> (ii) the way in which strengthening Colombia's national institutions (e.g. the Office of the Ombudsman) has helped to address both child recruitment and the demobilisation of child soldiers;<sup>773</sup> (iii) the Ugandan military's code of conduct which prohibits the sexual exploitation of girls (and women);<sup>774</sup> (iv) the publication on child protection for parliamentarians by the Inter-Parliamentary Union and the UN Children's Fund;<sup>775</sup> and (v) ECOWAS and Save the Children's joint training initiative on children's rights for armed forces in the West African region.<sup>776</sup> The latter recommendation gives us some indication as to why the proposals for addressing children's participation in hostilities interconnect with those regarding children who have already participated in hostilities. The training initiative focused on children's rights and protection 'before, during and after armed conflict'.<sup>777</sup> This suggests that the effective implementation of children's rights has been given priority for two reasons. First, the recruitment and conscription of child soldiers can constitute a war crime,<sup>778</sup> whilst sexual violence against children in conflict zones can constitute a crime against humanity.<sup>779</sup> Accordingly, the protection of children's rights can *directly relate* to the *prevention* of RtoP crimes within a State. Second, it is recognised that RtoP crimes are more likely to arise in a State which has a history of mass atrocities and/or armed conflict.<sup>780</sup> As a result, the protection of children's rights following their cessation of participation in hostilities is an important factor in implementing primary RtoP in order to prevent RtoP crimes *from re-arising* in the State, not least because this can help to reduce the prospect that the child will rejoin the armed factions perpetrating RtoP crimes.

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<sup>772</sup> UNSG Report 2009, Implementing RtoP (n 720), 14. For a discussion of the way in which the RtoP framework established in the 2001 ICISS Report could be used to protect child soldiers, see S Whitman, "The Responsibility to Protect and Child Soldiers" in W Knight and F Egerton (eds), *The Routledge Handbook of the Responsibility to Protect* (Routledge, Abingdon 2012) 152-166.

<sup>773</sup> UNSG Report 2009, Implementing RtoP, *ibid*.

<sup>774</sup> UNSG Report 2009, Implementing RtoP, *ibid*.

<sup>775</sup> UNSG Report 2009, Implementing RtoP, *ibid*.

<sup>776</sup> UNSG Report 2009, Implementing RtoP, *ibid*.

<sup>777</sup> UNSG Report 2009, Implementing RtoP, *ibid*.

<sup>778</sup> Rome Statute (n 724) arts 8 (2) (b) (xxvi) and (e) (vii).

<sup>779</sup> This includes 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity'. Rome Statute, *ibid*, art 7 (1) (g).

<sup>780</sup> UNSG 2009 Report, Implementing RtoP (n 720), 10-11.

A similar rationale seems to underscore the prioritisation of the rights of women. The UNSG makes several recommendations regarding the ways in which national authorities may safeguard the position of women within their respective societies in an RtoP context. The recommendations range from (i) training the military on gender related issues;<sup>781</sup> to (ii) supporting the networks of victims of mass atrocity crimes, including those with a specific focus on sexual violence against women;<sup>782</sup> and (iii) ensuring that access to justice is equal, free from gender discrimination and sensitive to the specific issues of women.<sup>783</sup> Again, the cross-cutting theme throughout the proposals regarding the rights of women is that women are often the victims of RtoP crimes, not least sexually-orientated crimes against humanity and, as such, deserve particular attention within strategies for preventing RtoP crimes at the national level.<sup>784</sup>

This writer would argue that there is a second rationale behind the citation of specific human rights in practice to date. That is, the specific circumstances on the ground in each State will ultimately influence *which* human rights that the national authorities should give particular attention to. Arguably, this can be seen in relation to the selection of the rights specified in the UNSG's Report. Clearly not all States will have national experience with child soldiers. Accordingly, the specific attention given to the use of children's rights seems to be largely directed at those States who have encountered, or are likely to encounter, the use of child soldiers within their territory.

The way in which the facts of a specific case will influence *which* rights are focused upon also comes through in the case studies of particular RtoP situations. Violations of freedom of expression underscored the violent responses to protests in Libya and Syria and the RtoP crimes which thereby emerged.<sup>785</sup> Accordingly, the international community urged the

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<sup>781</sup> UNSG 2009 Report, Implementing RtoP, *ibid*, 12.

<sup>782</sup> UNSG 2009 Report, Implementing RtoP, *ibid*, 14.

<sup>783</sup> UNSG 2009 Report, Implementing RtoP, *ibid*, 11-12.

<sup>784</sup> On the merits of adopting a gender analysis to the RtoP framework more generally, see particularly H Charlesworth, 'Feminist Reflections on the Responsibility to Protect' (2010) 2 GRtoP 232; J Bond and L Sherret, 'Mapping Gender and the Responsibility to Protect: Seeking Intersections, Finding Parallels' (2012) 4 (2) GRtoP 133; I Skjelsbaek, 'Responsibility to Protect or Prevent? Victims and Perpetrators of Sexual Violence Crimes in Armed Conflicts' (2012) 4 (2) GRtoP 154; E Stamnes, 'The Responsibility to Protect: Integrating Gender Perspectives into Policies and Practices' (2012) 4 (2) GRtoP 172; S E Davies and S Teitt, 'Engendering the Responsibility to Protect: Women and the Prevention of Mass Atrocities' (2012) 4 (2) GRtoP 198; J Karlsrud and R Solhjell, 'Gender-Sensitive Protection and the Responsibility to Prevent: Lessons from Chad' (2012) 4 (2) GRtoP 223; S Dharmapuri, 'Implementing UN Security Resolution 1325: Putting the Responsibility to Protect into Practice' (2012) 4 (2) GRtoP 241 and J Bond and L Sherret, "Securing Consistency for Consistent Security: Gender and the Responsibility to Protect" in Knight and Egerton (n 772), 166-181

<sup>785</sup> With regard to Libya see UNHRC, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya' (1 June 2011) UN Doc A/HRC/17/44, 49-54 (UNHRC, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya'). In relation to Syria see the UN Press Release, 'Special Advisers on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, release Statement Marking a Full Year of Violent Suppression of Anti-Government Protests in Syria' (15 March 2012) <<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 17 June 2012 (UN Press Release, 'Special Advisers on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, release Statement Marking a Full Year of Violent Suppression of Anti-

Libyan<sup>786</sup> and Syrian<sup>787</sup> national authorities to uphold their populations' right to freedom of expression. In contrast, the international community focused upon the right to non-discrimination in the cases of Kenya and Kyrgyzstan. Discrimination among ethnic groups underpinned the largely ethnically divided post-election violence in Kenya. Indeed, a recurrent finding in the Report of the fact-finding mission on the situation of human rights in Kenya was that the post-election violence was at least partly influenced by certain groups being discriminated against in terms of employment opportunities<sup>788</sup> and the allocation of land/resources.<sup>789</sup> In Kyrgyzstan, the UNSG's Special Adviser's on RtoP and the prevention of genocide<sup>790</sup> urged the national authorities to 'ensure protection of minorities'.<sup>791</sup> Whilst the implementation of specific minority rights was not explicitly mentioned, it is likely that the Special Advisers envisaged that minorities would be protected through the effective implementation of individual human rights and specific minority rights. The overarching theme in practice to date is therefore that certain rights may bear increased importance under primary RtoP when they directly relate to the RtoP crime that is apprehended in each case.

## *(ii) Criminal Law Measures*

Criminal law measures are the second form of the more specific implementation measures that have been proposed in practice to date. The first proposal is for States to criminalise RtoP crimes in their national legislation.<sup>792</sup> This recommendation is essentially designed to develop upon the more general recommendation for States to ratify relevant international instruments. In this line, the UNSG argued that:

'States should become parties to the relevant international instruments on human rights, international humanitarian law and refugee law, as well as to the Rome Statute of the International Criminal Court. But this is just a *first step towards full implementation in practice*. These core international standards need to be *faithfully embodied in national legislation*, so that the four specified crimes and violations and their incitement *are criminalised under domestic law and practice*'.<sup>793</sup>

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Government Protests in Syria'); UNHRC, 'Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic' (15 September 2011) UN Doc A/HRC/18/53, 8. (UNHRC, 'Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic').

<sup>786</sup> UNHRC Res S-15/1 (n 728), para 2.

<sup>787</sup> UNHRC Res S-16/1 (n 729), preambular para 6 and para 1.

<sup>788</sup> UNHCHR, 'Report from the OCHR Fact-Finding Mission to Kenya (6-28 February 2008)', 3, 6 and 7.

<sup>789</sup> UNHCHR, *ibid*, 5-6 and 9-10.

<sup>790</sup> UN Press Release, 'UN Special Advisers of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan' (15 June 2010)

<<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 17 June 2012.

<sup>791</sup> 'UN Special Advisers of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan', *ibid*.

<sup>792</sup> UNSG 2009 Report, Implementing RtoP (n 720), 11.

<sup>793</sup> UNSG 2009 Report, Implementing RtoP, *ibid*.

One advantage to criminalising RtoP crimes in national legislation relates to the nature of RtoP crimes, specifically the fact that they may entail ethnic cleansing.<sup>794</sup> There is a possibility that domestically criminalising RtoP crimes may, at least in some States, include codification of ethnic cleansing in a manner and form which goes beyond its current formulation within international law. As yet, there is limited guidance concerning this prospect within RtoP practice. However, at least one State Representative, Swaziland,<sup>795</sup> has treated the act as something separate from crimes against humanity. Swaziland stated that ‘systematic substitution of certain peculiar populations may amount to a special form of ethnic cleansing’<sup>796</sup> and called upon the UNSG ‘to have a closer look at ethnic cleansing and find means to broaden or deepen it to include such considerations’.<sup>797</sup> This suggests that Swaziland considered that the steady replacement of populations by a State should be recognised as an act of ethnic cleansing. This seems to exceed the scope of ethnic cleansing as that presently recognised to fall within the criminal elements of crimes against humanity. Outside forcible transfer of populations,<sup>798</sup> crimes against humanity do not appear to cover instances in which the demographics of a State are considerably altered through occupation, for example. Accordingly, Swaziland’s approach raises at least the possibility that the domestic criminalisation of RtoP crimes could involve them being codified in a novel way.

The UNSG clarified that the criminalisation of RtoP crimes should be propped up with appropriate national mechanisms to hold perpetrators accountable.<sup>799</sup> The rationale for this is two-fold. First, the prosecution of RtoP crimes enables national authorities to *react* to those RtoP crimes which have already been committed.<sup>800</sup> Second, the prosecution of RtoP crimes has a *deterrent* value because it sends out a clear message that mass atrocity crimes will not be met with impunity.<sup>801</sup> State views<sup>802</sup> give some suggestions as to the nature of the mechanisms which would achieve these purposes.

Generally, those States<sup>803</sup> who have proposed the national prosecution of perpetrators of

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<sup>794</sup> Outcome Document (n 718), paras 138-39.

<sup>795</sup> Statement of the Representative of *Swaziland* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

<sup>796</sup> Statement of the Representative of *Swaziland*, *ibid*.

<sup>797</sup> Statement of the Representative of *Swaziland*, *ibid*.

<sup>798</sup> Rome Statute (n 724) art 7 (1) (d).

<sup>799</sup> UNSG Report 2009, Implementing RtoP (n 720), 11-12.

<sup>800</sup> On the retributive element of criminal prosecution for mass atrocity crimes, see R Cryer (ed), *An Introduction to International Criminal Law and Procedure* (CUP, Cambridge 2007) 19-20.

<sup>801</sup> On the deterrent value of criminal prosecution for mass atrocity crimes, see Cryer, *ibid*, 20-22.

<sup>802</sup> This was recommended as a means of implementation by the following States: Statement of the Representative of *Canada* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statement of the Representative of *Botswana* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statement of the Representative of *Azerbaijan* to the UNGA in UN Press Release, ‘Delegates Weigh Legal Merits on Responsibility to Protect Concept as General Assembly Concludes Debate’ (n 743).

<sup>803</sup> Statements of the Representatives of *Canada*, *Botswana* and *Azerbaijan* to the UNGA, *ibid*.

RtoP crimes have largely referred to traditional judicial means. For example, Canada<sup>804</sup> cited its successful prosecution of a Rwandan genocidaire in the Supreme Court of Quebec to illustrate the way in which domestic prosecution could be an effective way for States to discharge primary RtoP. In contrast, Kenya<sup>805</sup> indicated that a more ad hoc mechanism could also be used to take redress against perpetrators of RtoP crimes. In the aftermath of the violence, the Kenyan authorities established the Kenyan Truth and Reconciliation Commission.<sup>806</sup> The Commission's objectives are wide ranging. In terms of holding the perpetrators of RtoP crimes to account, the Commission is mandated to act in conjunction with the criminal prosecution of perpetrators.<sup>807</sup> Whilst it may grant conditional amnesty to the perpetrators of some crimes, it is not mandated to do so in relation to acts that 'qualify as gross human rights violations'.<sup>808</sup> More broadly, the Commission aims to prevent gross human rights violations from re-arising by helping to repair the victims of the crimes committed, making recommendations for appropriate policy and legislative changes and helping to overcoming the tensions and healing process between different ethnic groups.<sup>809</sup>

We should offset the potential merits and demerits of prosecuting the perpetrators of RtoP crimes. First, it should be borne in mind that prosecuting perpetrators will not always be a straightforward way of complying with primary RtoP. Both international and national prosecutions of mass atrocity crimes can be problematic in cases where the crimes were perpetrated in conflict. Strauss<sup>810</sup> makes some interesting observations on this issue. He contends that evidence exists to suggest that ethnic cleansing in the Former Republic of Yugoslavia *increased* after the ICTY was established to investigate and prosecute perpetrators of mass atrocity crimes.<sup>811</sup> This relates to a wider debate in international law, namely the long-standing tension between (i) prosecuting those who have committed mass atrocity crimes; and (ii) preventing further mass atrocity crimes by negotiating peace in the State.<sup>812</sup> As one author<sup>813</sup> has explained, peace agreements will often try to get parties to accept that they should co-operate with criminal prosecution. However, the parties' rejection of the prosecution provisions could be less significant than a breakdown in their commitment

<sup>804</sup> Statement of the Representative of *Canada* to the UNGA, *ibid*.

<sup>805</sup> Statement of the Representative of *Kenya* to the UNGA in UN Press Release, 'Delegates Weigh Legal Merits on Responsibility to Protect Concept as General Assembly Concludes Debate' (n 743).

<sup>806</sup> See statement of the Representative of *Kenya* to the UNGA, *ibid* referring to the Truth and Reconciliation Bill 2008 in the context of the authorities' steps to implement primary RtoP. The Bill was subsequently adopted as the Truth and Reconciliation Act 2008.

<sup>807</sup> The Truth, Justice and Reconciliation Commission of Kenya, 'Mandate and Activities' <[http://www.tjrkenya.org/index.php?option=com\\_content&view=article&id=94&Itemid=124](http://www.tjrkenya.org/index.php?option=com_content&view=article&id=94&Itemid=124)> accessed 16 June 2012.

<sup>808</sup> The Truth, Justice and Reconciliation Commission of Kenya, *ibid*.

<sup>809</sup> See generally, The Truth, Justice and Reconciliation Commission of Kenya, 'Goals and Objectives', *ibid*.

<sup>810</sup> E Strauss, *The Emperor's New Clothes? The United Nations and the Implementation of the Responsibility to Protect* (Nomos, Baden Baden, 2009) 29.

<sup>811</sup> Strauss, *ibid*.

<sup>812</sup> See Anonymous, 'Human Rights in Peace Negotiations' (1996) 18 Hum. Rts. Q. 249 and P Akhavan, 'The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond' (1996) 18 Hum. Rts. Q. 259.

<sup>813</sup> See generally, Anonymous, 'Human Rights in Peace Negotiations', *ibid*.

to reach peaceful settlement because it is peace, not the prospect of prosecution, which will most effectively prevent further crimes from being committed.<sup>814</sup> Conversely, it is important to recall that, irrespective of the potential impact upon achieving peace, international human rights law does not accept that amnesties can be granted for gross violations of human rights, including RtoP crimes.<sup>815</sup> Accordingly, the flipside of incorporating a provision for the prosecution of the perpetrators of RtoP crimes in peace agreements is that it represents a further route through which States can fulfil its human rights obligations and comply with primary RtoP.

In general the prosecution of the perpetrators of RtoP crimes is regarded as being most effective when undertaken nationally, not internationally.<sup>816</sup> Notwithstanding this, some States may be opposed to international prosecution over national prosecution for quite controversial reasons. The debate surrounding whether or not Gaddafi's son (Saif Al-Islam Gaddafi) should be prosecuted internationally or nationally is a particularly good illustration. The situation in Libya was referred to the ICC by the UNSC for investigation.<sup>817</sup> As a result, Libya's claim for the right to hold a national prosecution should be considered within the context of the principle of complementarity<sup>818</sup> which provides that the ICC should consider exercising jurisdiction a State's national authorities are either unable or unwilling to prosecute the perpetrators of RtoP crimes.<sup>819</sup> Whilst there seems to be a willingness to prosecute the aforesaid member of the old regime, it remains unclear if Libya will show that it has the requisite ability to conduct a national prosecution.<sup>820</sup> This requirement takes into factors like whether the national authorities have the appropriate institutions and fair trial provisions in place in order to carry out the prosecution.<sup>821</sup> At present, Libya appears to lack

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<sup>814</sup> The author stated: '[t]argeting violators of human rights and bringing them to justice is essential. Accusation, however, comes more easily than making peace. The quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow'. Anonymous, 'Human Rights in Peace Negotiations', *ibid*, 258. One example which is referred to as illustrative of the tension between securing justice and peace is the fact that the Head of the Lord's Resistance Army (Joseph Kony) failed to participate in peace negotiations following the ICC's issue of a warrant for his arrest. On this issue see M Page, "Dealing with Atrocities in Northern Uganda" in R Cooper and J Kohler (eds), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (Palgrave Macmillan, New York 2009) 136-137.

<sup>815</sup> On this issue see for e.g. Cryer (n 800), 50-52 and further at 130-132.

<sup>816</sup> On this and the potential weaknesses of international criminal trials see Cryer, *ibid*, 17-36. See further, C Bassiouni, "Advancing the Responsibility to Protect Through International Criminal Justice" in Cooper and Kohler (n 814) 31-43 [examining the theoretical underpinnings of international justice and its objectives in relation to ensuring accountability for the mass atrocity crimes that RtoP covers].

<sup>817</sup> Rome Statute (n 724) art 27.

<sup>818</sup> For a more detailed analysis of the ICC's role in relation to Libya, including the significance of the principle of complementarity, see C Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility' (2012) 10 (2) J Int Crim Justice 325 and C Stahn, 'RtoP, the ICC and the Libyan Arrests' (*The Hague Justice Portal*, 24 November 2011) <<http://www.haguejusticeportal.net/index.php?id=12998>> accessed 12 May 2012 [examining the specific issues arising from the application of RtoP in Libya and the ICC's arrest warrants, with a particular emphasis on the way in which both appear to give effect to a notion of complementarity for responses to mass atrocity crimes].

<sup>819</sup> Rome Statute (n 724) art 27.

<sup>820</sup> H Al Schalchi, 'Fighters Want to Try Gaddafi Son: Libyan Lawyer' (*Reuters*, Tripoli, 11 April 2012) <<http://www.reuters.com/article/2012/04/11/us-libya-icc-idUSBRE83A1BL20120411>> accessed 16 June 2012.

<sup>821</sup> Rome Statute, (724) art 27.

the capacity to fulfil either of these requirements. To this effect, it is notable that Libya lacks national legislation to fully address the perpetrators of international crimes<sup>822</sup> and, furthermore, Libyan national legislation provides for the use of corporal punishment.<sup>823</sup> Accordingly, we should always bear in mind that although international prosecution may not always be the preferred option, it can sometimes be necessary for ensuring that the individual criminal responsibility of the perpetrators of RtoP crimes is upheld.<sup>824</sup>

### *(iii) Humanitarian Measures*

States can also use a range of humanitarian measures in order to comply with primary RtoP. One suggestion which has been made to date is that national authorities should permit the delivery of humanitarian aid to their populations and ensure that humanitarian personnel can access the populations within the territory.<sup>825</sup> This writer would argue that the European Parliament's (EP) responses to the situations in Burma and Darfur can help to explain this recommendation. In both cases, the EP<sup>826</sup> recalled RtoP<sup>827</sup> and raised concern over the populations inability to access humanitarian aid due to the State's inaction (not permitting access to aid agencies) and actions (expelling aid agencies).<sup>828</sup>

With regard to Burma, the EP proposed that Burma be referred to the ICC for possible crimes against humanity if the authorities *continued to* deny access to humanitarian agencies.<sup>829</sup> This suggests that the EP did not consider that the authorities' actions were tantamount to a crime against humanity but, rather, that their actions could *develop into* a crime against humanity. Accordingly, the case study of Burma appears to suggest that national authorities should permit access to humanitarian agencies not only to comply with their duties regarding the right to adequate food<sup>830</sup> but, also, in order to comply with their

<sup>822</sup> On the gaps in Libya's national legislation see Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility'' (n 818), 338-339.

<sup>823</sup> Stahn, *ibid*, 346-347. See also, Al Schalchi (n 820).

<sup>824</sup> But see M Mamdani, "Responsibility to Protect or Right to Punish?" in P Cunliffe (ed), *Critical Perspectives on the Responsibility to Protect: Interrogating Theory and Practice* (Routledge, Abingdon 2011) 125-139 which examines in some detail the way in which the RtoP framework and the grounds for the ICC's jurisdiction interconnect with the notion of State sovereignty as responsibility and, further, the broader enforcement and policy questions which can arise from the ICC exercising its jurisdiction in relation to the mass atrocity crimes that RtoP covers. See also, Bassiouni (n 816), 31-43.

<sup>825</sup> Statement of the Representative of *Sri Lanka* to the UNSC, UNSC Verbatim Record (26 June 2009) UN Doc S/PV.6151(Res.1). Statement of the Representative of *Congo* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781.

<sup>826</sup> EP Res, 'The Tragic Situation in Burma' (n 761) and EP Res, 'Expulsions of NGOs from Darfur (n 761).

<sup>827</sup> EP Res, 'The Tragic Situation in Burma', *ibid*, paras 5 and K and EP Res, 'Expulsions of NGOs from Darfur', *ibid*, para F.

<sup>828</sup> EP Res, 'The Tragic Situation in Burma', *ibid* and EP Res, 'Expulsions of NGOs from Darfur, *ibid*, para 3.

<sup>829</sup> EP Res, 'The Tragic Situation in Burma', *ibid*, para 11.

<sup>830</sup> Food and Agriculture Organisation of the United Nations, 'The Right to Adequate Food in Emergencies' (FAO Legislative Study No. 77, Rome 2002) 29

<<http://www.fao.org/DOCREP/005/Y4430E/y4430e04.htm#TopOfPage>> accessed 13 June 2012 (Food and Agriculture Organisation of the United Nations, 'The Right to Adequate Food in Emergencies') and UN



responsibility to prevent RtoP crimes from arising.<sup>831</sup> Admittedly, it is not immediately clear as to why a denial of access to humanitarian agencies would constitute a ‘widespread and systematic attack against the civilian population’.<sup>832</sup> The explanation for this stems from the development of extermination as a crime against humanity, specifically the fact that this is understood as that which can be perpetrated by the *denial of food* to a ‘civilian population’.<sup>833</sup>

In addition, it is worthwhile to note that the EP specifically referred to the longstanding discrimination against the Karen ethnic minority group and noted that they were disproportionately affected by the ineffective distribution of aid among the population.<sup>834</sup> This alludes to the possibility that the Burmese authorities were distributing food on a discriminatory basis, perhaps in light of the general understanding that denying food to a particular national, ethnic, racial or religious group can constitute genocide and a violation of the duty to respect the right to adequate food.<sup>835</sup>

The EP’s position on Darfur was slightly different. The Sudanese government was condemned for expelling aid agencies, not for failing to permit them access in the first place. The EP noted with concern several direct consequences of the expulsion, with particular emphasis on the way in which the expulsion could prevent populations from accessing the food and medicine that they had come to rely on.<sup>836</sup> The EP therefore reiterated that the Outcome Document provides for the international community to take action when national authorities manifestly fail to comply with their primary RtoP duty<sup>837</sup> and, furthermore, requested that the Resolution be forwarded to the ICC.<sup>838</sup> Given that a “manifest failure” is linked to national authorities’ failure to protect populations from RtoP crimes<sup>839</sup> and that the ICC focuses upon mass atrocity crimes,<sup>840</sup> there is scope to argue that the EP considered that the expulsion of aid agencies constituted an RtoP crime. Here, we should bear in mind that

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Committee on Economic, Social and Cultural Rights, ‘Substantive Issues Arising in the Implementation of the International Covenant on Economic Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food’ (12 May 1999) UN Doc E/C.12/1999/5, para 18. (UN Committee on Economic, Social and Cultural Rights, ‘Substantive Issues Arising in the Implementation of the International Covenant on Economic Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food’).

<sup>831</sup> Outcome Document (n 718), para 138.

<sup>832</sup> As per the requirements for the commission of a crime against humanity. Rome Statute (n 724) art 7 (1).

<sup>833</sup> Food and Agriculture Organisation of the United Nations, ‘The Right to Adequate Food in Emergencies’ (n 830), 29.

<sup>834</sup> EP Res, ‘The Tragic Situation in Burma’ (n 761), para G.

<sup>835</sup> Food and Agriculture Organisation of the United Nations, ‘The Right to Adequate Food in Emergencies’ (n 830), 29. On the way in which the discriminatory distribution of food on the basis of national, ethnical, racial, religious or other factors can violate States’ duty to respect the right of individuals to adequate food see, UN Committee on Economic, Social and Cultural Rights, ‘Substantive Issues Arising in the Implementation of the International Covenant on Economic Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food’ (n 830), para 18.

<sup>836</sup> EP Res, ‘Expulsions of NGOs from Darfur’ (n 761), paras C-E.

<sup>837</sup> EP Res, ‘Expulsions of NGOs from Darfur’, *ibid*, para F.

<sup>838</sup> EP Res, ‘Expulsions of NGOs from Darfur’, *ibid*, para 6. See further paras H and I.

<sup>839</sup> Outcome Document (n 718), para 139.

<sup>840</sup> Rome Statute (n 724) art 5.

the situation in Darfur was an armed conflict and, therefore, fell under the reach of international humanitarian law. Accordingly, the denial of food and water in this case could constitute not only a crime against humanity but also a war crime.<sup>841</sup> Consequently, the EP seems to consider that compliance with primary RtoP requires national authorities to take care not to ‘wilfully impede relief supplies’<sup>842</sup> that are intended for the population.

The explanation for why the access to humanitarian agencies has been detailed as a way of complying with primary RtoP therefore appears to be one of *result*. That is, RtoP crimes can be the result of a failure to permit access to/expulsion of aid agencies by undermining population’s access to food, water and medicine. This relates to Wong’s<sup>843</sup> argument regarding the actus reus of RtoP crimes. He argues that ‘RtoP applies not just to a government’s failure to protect its people from affirmatively perpetrated mass atrocities, but also from harm based on an *omission* where the government’s failure to act also constitutes a crime against humanity under international law’.<sup>844</sup> Following this view, it can be argued that compliance with primary RtoP requires that national authorities neither (i) commit RtoP crimes (e.g. expelling aid agencies and thereby ‘wilfully impeding relief supplies’<sup>845</sup>); nor (ii) fail to effectively act whenever RtoP crimes could arise from inaction on their part (e.g. to provide aid agencies with permission to enter their territory in order to prevent crimes against humanity from arising from a lack of food).

## 2 The Substance of Primary RtoP: General Findings

The above discussion of primary RtoP’s scope and its implementation in practice enables some general findings to be made with regard to the duty, including (i) the nature and character of States obligations under primary RtoP; (ii) the significance of the variable means of implementing primary RtoP; (iii) primary RtoP’s duration; (iv) primary RtoP’s interplay with secondary RtoP’s discharge; and (v) the significance and potential implications of primary RtoP’s connection with existing obligations/practice. These findings merit individual consideration.

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<sup>841</sup> Food and Agriculture Organisation of the United Nations, ‘The Right to Adequate Food in Emergencies’ (n 830), 28 and 29.

<sup>842</sup> Rome Statute (n 724) art 8 (2) (b) (xxv) [providing that ‘[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions’ represents a war crime for which can incur individual criminal responsibility].

<sup>843</sup> J Wong, ‘Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism’ (2009) 84 (2) Tulane Law Review 219.

<sup>844</sup> Wong, *ibid*, 222-23, emphasis original. For a similar argument on the way in which an omission to act could amount to one of the mass atrocity crimes that RtoP covers, see particularly A McLachlan-Bent and J Langmore, ‘A Crime Against Humanity? Implications and Prospects of the Responsibility to Protect in the Wake of Cyclone Nargis’ (2011) 3 GRtoP 37, 40 and 45.

<sup>845</sup> Rome Statute (n 724) art 8 (2) (b) (xxv).

## 2.1 States Obligations under Primary RtoP

Practice regarding primary RtoP lends some support to Hollenbach's<sup>846</sup> argument that the obligations inherent to the RtoP framework are both positive and negative in character. Hollenbach asserts that the positive obligations can be deduced from the requirement that States or the international community act in order to ensure that populations are protected from RtoP crimes.<sup>847</sup> This seems to correspond with the Outcome Document provision for national authorities to use 'appropriate and necessary means'<sup>848</sup> to fulfil primary RtoP and, furthermore, the trend in practice toward compliance with primary RtoP requiring that States take steps to prevent RtoP crimes from arising. For example, by (i) ratifying relevant human rights, humanitarian and criminal law instruments;<sup>849</sup> (ii) educating the future generation about the RtoP framework and/or the legal obligations which underpin it;<sup>850</sup> and (iii) ensuring that those who incite or otherwise perpetrate RtoP crimes are prosecuted.<sup>851</sup> Furthermore, the fact that relevant actors have reminded national authorities that they are obligated to not incite or otherwise perpetrate RtoP crimes when recalling primary RtoP, tends to support Hollenbach's<sup>852</sup> argument that primary RtoP also entails the negative obligation for national authorities to refrain from committing RtoP crimes.

We should also consider McClean's<sup>853</sup> argument that the "responsibility to prevent" formulated in the 2001 ICISS Report correlates with the "respect, protect, fulfil"<sup>854</sup>

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<sup>846</sup> D Hollenbach, 'Humanitarian Intervention: Why, When and How?' *Commonweal Magazine* (New York, 3 November 2010) <<http://www.commonwealmagazine.org/humanitarian-intervention-0>> accessed: 6 November 2010.

<sup>847</sup> Hollenbach, *ibid*.

<sup>848</sup> Outcome Document (n 718), para 138.

<sup>849</sup> UNSG Report 2009, Implementing RtoP (n 720), 5, 6 and 11. See also the Statement of the Representative of *Mali* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statements of the Representatives of *France*, *Sweden (on behalf of the European Union)* and *Bosnia and Herzegovina* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97; Statement of the Representative of *Hungary* to the UNGA in UN Press Release, 'More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (n 744) and Statement of *Jamaica (on behalf of CARICOM)* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

<sup>850</sup> Global Centre for the Responsibility to Protect 'Meeting Summary – Fulfilling the Responsibility to Protect: Strengthening our Capacities to Halt and Prevent Mass Atrocities' (24 September 2010), 3 <<http://globalr2p.org/advocacy/index.php>> accessed 17 June 2012 and Statement of the Representative of *Congo* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781.

<sup>851</sup> Statement of the Representative of *Canada* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statement of the Representative of *Botswana* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statement of the Representative of *Azerbaijan* to the UNGA in UN Press Release, 'Delegates Weigh Legal Merits on Responsibility to Protect Concept as General Assembly Concludes Debate' (n 743).

<sup>852</sup> Hollenbach (n 846).

<sup>853</sup> E McClean, 'The Responsibility to Protect: The Role of International Human Rights Law' (2008) 13 (1) *Journal of Conflict and Security Law* 123, 144-45.

<sup>854</sup> For a discussion of the way in which these obligations form the roots of primary RtoP, see D Gierczyk, "The Responsibility to Protect: A Legal and Rights-Based Perspective" in A Bellamy, S E Davies and L Glanville (eds), *The Responsibility to Protect and International Law* (Martinus Nijhoff, Leiden 2011) 104-110 and E Aba and M Hammer, *Yes We Can? Options and Barriers to Broadening the Scope of the Responsibility to Protect to include Cases of Economic Social and Cultural Rights Abuses* (One World Trust, London, 2009) 6-7.

trichotomy of States existing human rights obligations.<sup>855</sup> Article 27 of the International Covenant on Civil and Political Rights regarding minority rights is a good example of this trichotomy in practice. Although this was formulated in negative terms in order to increase the prospect of it being adopted universally, it is generally accepted that its effective implementation requires State parties to also act positively.<sup>856</sup> Accordingly, State parties are obligated to refrain from interfering in the enjoyment of the rights contained therein (“respect”), to take steps to protect minorities from the rights being breached by ‘other persons within the State party’<sup>857</sup> (“protect”) and to ensure that the rights can be enjoyed within the State<sup>858</sup> (“fulfil”). The present author would therefore argue that elements of practice appear to reinforce McClean’s<sup>859</sup> argument because primary RtoP similarly requires that national authorities (i) refrain from perpetrating RtoP crimes;<sup>860</sup> (ii) take action to help protect the population from RtoP crimes perpetrated by non-State actors, such as by prosecuting perpetrators;<sup>861</sup> and (iii) ensure that populations can enjoy their protection from RtoP crimes within the State, such as by training the police and military on RtoP and the obligations which underscore it.<sup>862</sup>

## 2.2 Variable Means of Implementation

A recurrent theme throughout the discussion of primary RtoP’s scope, and in practice more generally, is that primary RtoP’s implementation can vary from State to State in three ways. First, implementation can be *tapered* to the specific problems of each RtoP case. For example, when seeking to prevent RtoP crimes from being perpetrated in the State *again*, national authorities may choose to focus upon the rehabilitation of child soldiers in order to counter the risk that their rejection in the community may lead them to rejoin the military/armed group.<sup>863</sup> In cases where RtoP crimes have been perpetrated *outside the context of armed conflict*, national authorities may choose to focus on addressing the ethnic, economic or religious tensions which underscored the previous commission of RtoP crimes in the State. In cases where national policies on issues like land rights are considered to

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<sup>855</sup> McClean (n 853), 144-45.

<sup>856</sup> This interpretation was given by the UN Human Rights Committee, ‘General Comment 23: Article 27- Rights of Minorities’ (Fiftieth Session, 1994) para 5. For a good overview of the debates regarding the character of States duties under Article 27 of the ICCPR, see generally R Cholewinski, ‘State Duty Towards Ethnic Minorities: Positive or Negative?’ (1988) 10 (3) Hum. Rts. Q 344.

<sup>857</sup> Human Rights Committee, *ibid*.

<sup>858</sup> Human Rights Committee, *ibid*.

<sup>859</sup> McClean (n 853), 144-45.

<sup>860</sup> See e.g. UNSC Res 2014 (n 730), preambular para 14; UNHRC Res S-15/1 (n 728), para 2 and UNHRC Res S-16/1 (n 729), para 7.

<sup>861</sup> UNSG 2009 Report, Implementing RtoP (n 720), 11.

<sup>862</sup> UNSG Report 2009, Implementing RtoP, *ibid*, 12.

<sup>863</sup> UNSG Report 2009, Implementing RtoP, *ibid*, 14.

benefit some ethnic groups over others, as was the case in Kenya,<sup>864</sup> national authorities may choose to focus on developing appropriate policies to overcome such perceptions of discrimination. When a particular minority group has been specifically targeted in previous violence, such as the Uzbek's in Kyrgyzstan, national authorities may select to handle their ethnic diversity more positively by implementing specific minority rights.<sup>865</sup> When national authorities are concerned with preventing RtoP crimes from emerging for the first time in the State, consideration can be given to strengthening national guarantees for human rights, for example. In doing so, any potential risk factors may be focused upon, such as improving the perception of women within the society and encouraging cultural, linguistic and religious diversity through the effective enforcement of minority rights and rights to freedom of expression and non-discrimination.

Second, implementation can vary in terms of whether the State is to *act* or *omit to act*. The above examples would entail the State taking positive steps to comply with primary RtoP, whereas in cases like Darfur<sup>866</sup> and Burma<sup>867</sup> the requirement was for the State to not act in a particular manner again (e.g. by expelling aid agencies, refusing to permit the aid agencies access). Sometimes, this can vary in accordance with the way in which a particular RtoP case evolves. Originally in Libya and Syria the emphasis was on national authorities *refraining from* shooting at peaceful protesters<sup>868</sup> but, as these cases progressed, the national authorities were urged to also take positive steps. For instance, to put in place mechanisms to *ensure* that the delivery of aid was not impeded<sup>869</sup> and that UN observers could safely carry out their mandate.<sup>870</sup>

Third, different national authorities can use the *same* means of implementing primary RtoP in *alternate* ways. Whilst one State may domestically criminalise ethnic cleansing in accordance with its traditional understanding as a crime against humanity, it was noted above that there is some scope to suggest that Swaziland<sup>871</sup> may codify ethnic cleansing in a wider sense. A further illustration of this is the prosecution of those who perpetrate RtoP crimes. One State may choose to prosecute the perpetrators of RtoP crimes through a traditional judicial trial, whereas another may select to supplement this with a truth and

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<sup>864</sup> UNHCHR, 'Report from the OCHR Fact-Finding Mission to Kenya (6-28 February 2008)' (n 788), 5-6 and 9-10.

<sup>865</sup> UN Press Release, 'UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan' (n 790). On the ethnic divisions in this region and its contribution to the violence that has emerged within respective States, see J Claes, 'Preventing Conflict in the "Stans"' (2010) United States Institute of Peace: Peace Brief No. 21, 3 <<http://www.usip.org/publications/preventing-conflict-in-the-stans>> accessed 17 June 2012.

<sup>866</sup> EP Res, 'Expulsions of NGOs from Darfur' (n 761), paras 3 and F.

<sup>867</sup> EP Res, 'The Tragic Situation in Burma' (n 761), paras 5 and K.

<sup>868</sup> UNHRC Res S-15/1 (n 728), para 1 and UNHRC Res S-16/1 (n 729), para 1.

<sup>869</sup> UNSC Res 1973 (n 728), para 3.

<sup>870</sup> UNSC Res 2043 (2012) UN Doc S/RES/2043, paras 7 and 8. (UNSC Res 2043).

<sup>871</sup> Statement of the Representative of Swaziland to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

reconciliation commission.

This writer would therefore argue that enabling primary RtoP to be implemented through variable means suggests that States have a *margin of appreciation* regarding which means that they use in order to comply with it. At a practical level, this enables States to *tailor-fit* primary RtoP to the protection needs of the population in the factual context at issue. At a policy level, this approach can ease concerns that primary RtoP's discharge will impact upon States particular national interests.<sup>872</sup> This is because the approach essentially leaves States with discretion over the specific measures that they choose to utilise in order to implement primary RtoP, as opposed to being required to implement particular measures by the international community. This discretion comes through in the Outcome Document and subsequent UN guidance on RtoP's implementation. The Outcome Document provides that primary RtoP should be implemented through 'appropriate and necessary'<sup>873</sup> means. A review of its drafting history illustrates that this phrase was not included within preliminary drafts,<sup>874</sup> thereby suggesting that it was included as the result of State negotiations. However, neither the statements delivered during the drafting process nor those delivered in subsequent practice clarify *why* it was added. There is therefore the possibility that 'appropriate'<sup>875</sup> was included in the Outcome Document in order to denote that the *specific means* States use to implement primary RtoP are not mandatory but, rather, discretionary in accordance with the specific circumstances on the ground in each case. With regard to UN guidance, it is notable that the UNSG's Report suggests that primary RtoP bearers 'could'<sup>876</sup> or 'should'<sup>877</sup> implement specific means internally, as opposed to "must". The qualified language used to outline the means of implementation tends to support the view that primary RtoP was formulated to entail a margin of appreciation.

With regard to the effectiveness and significance of the variable approach taken to the means of implementing primary RtoP, we can draw upon international human rights mechanisms. The approach seems to overlap with that adopted in the field of minority

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<sup>872</sup> The United States' reservations regarding ratification of the Rome Statute are but one example. Groves has argued that the US should reject the RtoP framework because it *encourages* the State to take particular courses of action, namely the ratification of international instruments that it considers to be detrimental to its wider national political interests, such as the way in which ratification of the Rome Statute entails the implication that US nationals may be prosecuted for crimes carried out in a State party's territory. S Groves, 'The US should Reject the U.N "Responsibility to Protect" Doctrine' (The Heritage Foundation Background Executive Summary No. 2130, 2008) 3-4 < <http://www.heritage.org/research/reports/2008/05/the-us-should-reject-the-un-responsibility-to-protect-doctrine> > 17 June 2012. The US position on the ICC and its rationale for this position has been noted in RtoP discourse, notably by Feinstein and Thakur. See respectively L Feinstein, 'Darfur and Beyond: What is Needed to Prevent Mass Atrocities' (2007) 22 Council on Foreign Relations 1, 36 and R Thakur, 'Behind the Headlines: Iraq and the Responsibility to Protect' (2004) 62 (1) Canadian Institute of International Affairs 1, 5.

<sup>873</sup> Outcome Document (n 718), para 138.

<sup>874</sup> See e.g. UNGA President, 'Draft Outcome Document' (22 July 2005) UN Doc A/59/HLPM/CRP.1/Rev.1, paras 113-114.

<sup>875</sup> Outcome Document (n 718), para 138.

<sup>876</sup> UNSG Report 2009, Implementing RtoP (n 720), 10, 12.

<sup>877</sup> UNSG Report 2009, Implementing RtoP, *ibid*, 11 and 12.

protection on the basis that international,<sup>878</sup> regional<sup>879</sup> and bilateral<sup>880</sup> minority protection instruments also use qualifying terms, such as “appropriate”, to enable their means of implementation to accommodate each State’s specific context. Such phrases have been generally understood to recognise a margin of appreciation for duty bearers<sup>881</sup> and thereby allow States flexibility concerning how they domestically implement the rights therein.<sup>882</sup> The *rationale* for the formulation of a margin of appreciation in a minority protection context is interesting. The early efforts of external organs to obligate States to protect their minorities were considered by some States to violate their sovereignty because they sought to impose specific protection duties upon them.<sup>883</sup> In short, the formulation of specific protection duties upon States was considered to be an attempt of ‘the greater Powers, to impose their will upon the smaller States’.<sup>884</sup> The RtoP framework asks States to accept that they can be the subject of international action, including through armed force, should RtoP crimes occur or threaten to occur in the territory.<sup>885</sup> Accordingly, it is arguable that formulating primary RtoP to entail a margin of appreciation may have helped to make the framework more palatable to States, not least because it helps to guard against external interference in States internal affairs *until* the need to protect populations from RtoP crimes

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<sup>878</sup> UNGA, ‘Declaration on the Rights of Persons Belonging to National, Ethnic, Linguistic or Religious Minorities’ (n 748) art 1 (2) provides that ‘States shall adopt appropriate legislative and other measures’ to give effect to the rights of persons belonging to national, ethnic, linguistic or religious minorities provided by the Declaration.

<sup>879</sup> For e.g. Article 12 (1) of the Framework Convention for the Protection of National Minorities provides that ‘[t]he Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority’, emphasis added. Framework Convention for the Protection of National Minorities (1995) 34 ILM 351 art 12 (1).

<sup>880</sup> The following agreements incorporated a similar approach into the right of minorities to effective participation in national and regional decision-making on matters concerning minorities: Germany and Poland (1991); Poland and Belarus (1992); Russia-Kazakhstan (1992); Poland and Lithuania (1994); Hungary and Slovakia (1995); Hungary and Romania (1996). Bilateral agreements detailed in K Gal, ‘Bilateral Agreements in Central and Eastern Europe: A New Inter-State Framework for Minority Protection?’ (1999) ECMI Working Paper No. 4, 22 <<http://www.ecmi.de/publications/detail/04-bilateral-agreements-in-central-and-eastern-europe-a-new-inter-state-framework-for-minority-protection-191/>> accessed 14 October 2012.

<sup>881</sup> Pentassuglia explains that the phrase provides some discretion to State Parties in their domestic implementation of minority rights. G Pentassuglia, ‘Minority Rights, Human Rights: A Review of Basic Concepts, Entitlements and Implementation Procedures under International Law’ in M Weller and A Morowa (eds), *Mechanisms for the Implementation of Minority Rights* (Council of Europe Press, Strasbourg 2005) 16.

<sup>882</sup> Nasic explains the effect of the phrase in its usage in the Framework Convention. She directs that ‘[p]rogrammatic provisions often contain qualifying phrases such as “substantial numbers”, “a real need”, “where appropriate”, and “as far as possible,” giving the state parties certain flexibility when they implement the Framework Convention through national legislation and appropriate governmental policies’. H Nasic, ‘Minority Rights Instruments and Mechanisms: Minority Protection along the Conflict Continuum’ (2007) EURAC Research, European Academy, 40.

<sup>883</sup> These debates were aired at the Paris Peace Conference which established the Treaty of Versailles, and thereby the League of Nations. On the Paris Peace Conference 1919 generally, see e.g. P Thornberry, *International Law and the Rights of Minorities* (OUP, Oxford 1991) 26. On the specific debates regarding the imposition of specific duties on States to protect their minorities, see H V Temperley, *A History of the Peace Conference of Paris, Vol. V* (OUP, London 1921) 121-131 and H J Steiner, P Alston and R Goodman, *International Human Rights In Context* (3rd edition OUP, Oxford 2007) 96.

<sup>884</sup> Temperley, *ibid*, 129.

<sup>885</sup> Outcome Document (n 718), para 139.

arises.<sup>886</sup>

Finally, there is the question of whether a margin of appreciation can be reconciled with primary RtoP as a duty of *universal* application. Here, we can draw by analogy on the development of States' duties under broader human rights mechanisms, specifically those in relation to socio-economic rights. Although all State parties are obligated to implement these rights, their implementation can be of a programmatic, progressive nature.<sup>887</sup> This is in view of the fact that it may be difficult for a State to immediately put in place the necessary guarantees for the enjoyment of the right in the territory or, indeed, that some mechanisms for the enjoyment of the right may be more relevant to some States than others.<sup>888</sup> Accordingly, States are given considerable discretion over the specific means that they use to implement the right. This approach may help to explain why the Outcome Document provides that the means used to implement primary RtoP should be 'appropriate *and* necessary'.<sup>889</sup> Arguably, the inclusion of 'necessary'<sup>890</sup> was intended to enable States' to implement primary RtoP programmatically and, therefore, permitting States to disregard those means of implementation which are irrelevant to their specific factual context. An illustration which seems to support this interpretation is the fact that the UK government has not referred to using means to implement primary RtoP.<sup>891</sup> There is scope to argue that this is because the UK has implemented most, if not all, of those measures which are relevant to safeguarding populations from RtoP crimes within its specific factual context (e.g. human rights legislation, membership of the ICC).

Whilst States' implementation of socio-economic rights can be programmatic, each State is under 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the'<sup>892</sup> socio-economic rights. The 'minimum core obligation'<sup>893</sup> typically requires that the State refrain from violating the basic protection which the rights aim to provide. If we draw by analogy upon this, there is scope to argue that the primary RtoP duty entails certain minimum standards which *all* States are required to comply with, irrespective of their factual context, not least that national authorities should not perpetrate

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<sup>886</sup> With regard to this threshold in terms of providing international assistance under secondary RtoP, see para 138 of the Outcome Document. In terms of the threshold in relation to the provision of peaceful means or the implementation of a 'timely and decisive response' under secondary RtoP, see Outcome Document, *ibid*.

<sup>887</sup> UN Committee on Economic, Social and Cultural Rights, 'The Nature of States Parties Obligations (Art. 2, par.1) CESCR General Comment No. 3' (14 December 1990), para 9. (UN Committee on Economic, Social and Cultural Rights, 'The Nature of States Parties Obligations (Art. 2, par.1) CESCR General Comment No. 3').

<sup>888</sup> UN Committee on Economic, Social and Cultural Rights, *ibid*.

<sup>889</sup> Outcome Document (n 718), para 138, emphasis added.

<sup>890</sup> Outcome Document, *ibid*.

<sup>891</sup> In 2009 Lord Jay of Ewelme contended that 'shamefully, little has happened to put' RtoP 'into effect' and asked what the UK government was doing to 'give effect to the UN doctrine of the Responsibility to Protect'. Notably, the government's responses focused on the implementation of secondary RtoP. 'UN: Responsibility to Protect' HL Debate 30 June 2009, vol 712, cols 192-195.

<sup>892</sup> UN Committee on Economic, Social and Cultural Rights, 'The Nature of States Parties Obligations (Art. 2, par.1) CESCR General Comment No. 3' (n 887), para 10.

<sup>893</sup> UN Committee on Economic, Social and Cultural Rights, *ibid*.



RtoP crimes. This seems consistent with the fact that the Outcome Document explicitly commits ‘each individual State’<sup>894</sup> to ‘act in accordance’<sup>895</sup> with the duty, not only States which are most at risk of RtoP crimes. As the UNSG notes, ‘even relatively stable, developed and progressive’<sup>896</sup> States should *reassess* the measures that they have in place for preventing RtoP crimes.<sup>897</sup>

### 2.3 The Duration of the Primary RtoP Duty

A significant trend in practice regarding primary RtoP is that national authorities have been reminded of their duty, or have implemented it, at *different stages* of RtoP cases. In Libya, the UNHRC and UNSC reiterated the primary RtoP duty of Libyan national authorities when RtoP crimes were apprehended as *being* perpetrated within the State.<sup>898</sup> In contrast, the Kenyan authorities suggested that they had implemented the duty through legislative means *after* the cessation of the post-election violence in which RtoP crimes had been committed.<sup>899</sup> In Kyrgyzstan, the Joint Statement of the UN Special Advisers on the Prevention of Genocide and RtoP<sup>900</sup> called for the national authorities to (i) effectively implement their primary RtoP duty in order to stop the violence,<sup>901</sup> and (ii) to put in place measures which reduced the prospect of RtoP crimes arising again.<sup>902</sup> Furthermore, the Joint Statement of the aforementioned Special Advisers on Libya<sup>903</sup> also recalled the primary RtoP duty of the national authorities of all States ‘facing large-scale popular protests’.<sup>904</sup> These variations in practice have a bearing on the duration of the primary RtoP duty. Essentially, the variations indicate that the primary RtoP duty *continues before* (e.g. Arab States in general), *during* (e.g. Libya, Kyrgyzstan) and *after* (e.g. Kyrgyzstan, Kenya) the perpetration of RtoP crimes within a State. The ongoing nature of primary RtoP also comes through in the means

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<sup>894</sup> Outcome Document (n 718), para 138, emphasis added.

<sup>895</sup> Outcome Document, *ibid*, emphasis added.

<sup>896</sup> UNSG Report 2009, Implementing RtoP (n 720), 12.

<sup>897</sup> The UNSG advises that all States should ‘ask themselves whether they are vulnerable to such events; whether the seeds of intolerance, bigotry and exclusion could take root and grow into something horrific and self-destructive; and whether their social, economic and political systems have self-correcting mechanisms in place to discourage and derail such impulses. Candid self-reflection, searching dialogue among groups and institutions, both domestically and internationally, and periodic risk assessment are needed in both fragile and seemingly healthy societies in all regions of the world’. UNSG Report 2009, Implementing RtoP, *ibid*.

<sup>898</sup> UNHRC Res S-15/1 (n 728), para 2; UNSC Res 1970 (n 728), preambular para 9 and UNSC Res 1973 (n 728), preambular para 4. The UNHRC also took this approach in relation to Syria, see UNHRC Res S-16/1 (n 729), para 1.

<sup>899</sup> See Statement of the Representative of Kenya to the UNGA in UN Press Release, ‘Delegates Weigh Legal Merits on Responsibility to Protect Concept as General Assembly Concludes Debate’ (n 743).

<sup>900</sup> UN Press Release, ‘UN Special Advisers of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan’ (n 790).

<sup>901</sup> UN Press Release, *ibid*.

<sup>902</sup> UN Press Release, *ibid*.

<sup>903</sup> UN Press Release, ‘UN Special Adviser on the Prevention of Genocide, Francis Deng, and Special Adviser on the Responsibility to Protect, Edward Luck, on the Situation in Libya’ (22 February 2011)

<<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 17 June 2012.

<sup>904</sup> UN Press Release, *ibid*.

proposed for its implementation. For example, training the military and police on human rights and humanitarian law may be a useful step to take *before* RtoP crimes emerge,<sup>905</sup> permitting access to humanitarian agencies can be helpful *during* the crises,<sup>906</sup> whilst rehabilitating child soldiers and prosecuting the offenders of RtoP crimes are useful ways of implementing primary RtoP *after* RtoP crimes have been committed in the State.<sup>907</sup>

Primary RtoP as an ongoing duty also has more general significance because it raises the possibility that primary and secondary RtoP can be implemented *concurrently*. In terms of secondary RtoP's international assistance component, reference can be made to the fact that, when encouraging the Kyrgyzstan authorities to implement primary RtoP, the UNSG's Special Advisers on RtoP and the prevention of genocide urged the international community 'to operationalise *its* "responsibility to protect" by providing coordinated and timely assistance to stop the violence and its incitement'.<sup>908</sup> With regard to secondary RtoP's non-peaceful responsive component<sup>909</sup>, reference can be made to the fact that UNSC Resolutions 1970 and 1973 *both* (i) recalled the primary RtoP duty of the Libyan national authorities;<sup>910</sup> *and* (ii) authorised the application of measures which can be used to discharge secondary RtoP, not least collective sanctions<sup>911</sup> and the use of armed force to protect civilians.<sup>912</sup> Accordingly, practice to date suggests that one impact of framing primary RtoP as an ongoing duty is that it enables primary and secondary RtoP to be implemented concurrently.

Concurrent implementation of primary RtoP and secondary RtoP undermines the argument in present literature that primary and secondary RtoP are to be implemented *independently* of one another and, therefore, that the State's primary RtoP duty suspends once secondary RtoP is applied.<sup>913</sup> This view comes through in the use of terminology which suggests a strict divide between primary and secondary RtoP's implementation. For example (i) that the international community bears a 'fallback responsibility';<sup>914</sup> (ii) that the duty to protect populations will 'shift'<sup>915</sup> from the State to the international community; and (iii) that

<sup>905</sup> UNSG Report 2009, Implementing RtoP (n 720), 12.

<sup>906</sup> EP Res, 'The Tragic Situation in Burma' (n 761) and EP Res, 'Expulsions of NGOs from Darfur' (n 761).

<sup>907</sup> UNSG Report 2009, Implementing RtoP (n 720), 11 and 14.

<sup>908</sup> UN Press Release, 'UN Special Advisers of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan' (n 790), emphasis added.

<sup>909</sup> Outcome Document (n 718), para 139.

<sup>910</sup> UNSC Res 1970 (n 728), preambular para 9 and UNSC Res 1973 (n 728), preambular para 4.

<sup>911</sup> UNSC Res 1970, *ibid*, paras 9 to 25.

<sup>912</sup> UNSC Res 1973 (n 728), paras 4 to 12.

<sup>913</sup> See e.g. A Peters, 'Humanity as the Alpha and Omega of Sovereignty' (2009) 20 (3) EJIL 513; R Cohen, 'Strengthening Protection of IDP's: The UN's Role' (2006) 7 (1) Georgetown Journal of International Affairs 101; H Nasu, 'Operationalising the "Responsibility to Protect" and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict' (2009) 14 (2) Journal of Conflict & Security Law 209; M Kalkman, 'Responsibility to Protect: A Bow Without an Arrow' (2009) 5 Cambridge Student L. Rev 75; V Holt and T Berkman, *The Impossible Mandate? Military Preparedness, The Responsibility to Protect and Modern Peace Operations* (The Henry L. Stimson Centre, Washington D.C. 2006); McClean (n 853), 123-152 and N Turner and N Otsuki, *The Responsibility to Protect Minorities and the Problem of the Kin State* (United Nations University, Tokyo 2010).

<sup>914</sup> Peters, *ibid*, 513.

<sup>915</sup> Cohen, 'Strengthening Protection of IDP's: The UN's Role' (n 913), 102 and Nasu (n 913), 215.

the responsibility to protect populations will devolve,<sup>916</sup> ‘fall on’<sup>917</sup> or ‘fall to’<sup>918</sup> the international community. Conversely, the argument that primary RtoP is an ongoing duty capable of being implemented concurrently with secondary RtoP reinforces the assertions of Bellamy<sup>919</sup> and Luck.<sup>920</sup> Whilst Bellamy argues that the primary RtoP duty is ‘enduring’,<sup>921</sup> Luck<sup>922</sup> argues that a crucial distinction between RtoP and the wider concept of humanitarian intervention is that the former enables *collaboration* between the State and international community on protection issues. Examination of practice regarding primary RtoP can develop these arguments somewhat. The discussion of the duration of the primary RtoP duty can add precision to Bellamy’s<sup>923</sup> argument by explaining the extent to which the primary RtoP duty can be said to “endure”. That is, that the primary RtoP duty has been approached in practice as that which holds before, during and after RtoP crimes arise in a State.

Arguments made more generally within RtoP literature suggest that the concurrent implementation of primary and secondary RtoP could entail implications, however. A continuing duty may suggest that the international community and the State can act as *dual bearers*. Some commentators<sup>924</sup> argue that this could lead to protection being undermined by debates over *which* bearer has the responsibility to act in any given case. Stahn,<sup>925</sup> Payandeh<sup>926</sup> and Bellamy<sup>927</sup> note that the Outcome Document provides for secondary RtoP to

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<sup>916</sup> Kalkman (n 913), 84.

<sup>917</sup> Holt and Berkman (n 913), 2.

<sup>918</sup> McClean (n 853), 127 and Turner and Otsuki (n 913), 3.

<sup>919</sup> A Bellamy, ‘The Conflict in Sri Lanka and the Responsibility to Protect’ (*e-International Relations*, 1 May 2009) <<http://www.e-ir.info/2009/05/01/the-conflict-in-sri-lanka-and-the-responsibility-to-protect/>> accessed 10 October 2010. For a similar viewpoint see also, A Bellamy and T Hunt, ‘Mainstreaming the Responsibility to Protect in Peace Operations’ (2010) Asia-Pacific Centre for the Responsibility to Protect, Programme on the Protection of Civilians, Working Paper No. 3, 8.

<sup>920</sup> E C Luck, ‘The United Nations and the Responsibility to Protect’ (August 2008) The Stanley Foundation Policy Analysis Brief, 5 <<http://www.stanleyfoundation.org/policyanalysis.cfm?id=345>> accessed 8 October 2012.

<sup>921</sup> Bellamy, ‘The Conflict in Sri Lanka and the Responsibility to Protect’ (n 919) and Bellamy and Hunt (n 919), 8. The UNSG also seems to take the view that primary RtoP is ongoing, referring to primary RtoP as an ‘enduring responsibility’. UNSG Report 2009, Implementing RtoP (n 720), 26.

<sup>922</sup> Luck, ‘The United Nations and the Responsibility to Protect’ (n 920), 5.

<sup>923</sup> Bellamy, ‘The Conflict in Sri Lanka and the Responsibility to Protect’ (n 919) and Bellamy and Hunt (n 919), 8.

<sup>924</sup> See particularly, A Bellamy, ‘Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq’ (2005) 19 *Ethics & International Affairs* 31; C Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ 101 (1) *AJIL* 99; Stahn, ‘RtoP, the ICC and the Libyan Arrests’ (n 818); Stahn, ‘Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’ (n 818); M Payandeh, ‘With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking’ (2010) 35 *Yale Journal of Int’l L.* 469 and N Wheeler, ‘A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit’ (Paper presented at ‘The UN at Sixty: Celebration or Wake?’ conference, University of Toronto, Canada, 6-7 October 2005), 8 <<http://cadair.aber.ac.uk/dspace/bitstream/2160/1971/1/a%20victory%20for%20common%20humanity%20Wheeler.pdf>> accessed 12 May 2012.

<sup>925</sup> Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’, *ibid*, 166-117.

<sup>926</sup> Payandeh (n 924), 498. Payandeh goes as far as to argue that it is the potential ambiguity over where protective responsibility lies in each case which could arise from the concept of a dual bearer that led States to accept the RtoP framework at the World Summit. Payandeh, 498.

<sup>927</sup> Bellamy, ‘Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq’ (n 924), 43.

be discharged through a ‘timely and decisive response’<sup>928</sup> when (i) national authorities are manifestly failing to protect their populations; and (ii) peaceful means would be inadequate to ensure their protection.<sup>929</sup> These commentators<sup>930</sup> consider that these criteria will lead to disagreement over whether the protection of a population from RtoP crimes falls within the remit of the State or international community’s RtoP. As Stahn<sup>931</sup> puts the issue, the Outcome Document criteria create a ‘complementarity trap’.<sup>932</sup> Bellamy,<sup>933</sup> Stahn<sup>934</sup> and Wheeler<sup>935</sup> ground this argument in the way in which the UNSC responded to the crisis in Darfur in 2004. They argue that the responses of UNSC members suggest that there was a lack of consensus on where RtoP lies in each case, specifically whether the situation should be handled by the State under primary RtoP or the international community under secondary RtoP.<sup>936</sup> The present author does not find this argument compelling for two reasons. First, there is a need to exercise sufficient caution when drawing lessons about the duration of RtoP from the UNSC’s approach to the situation in Darfur in 2004. This took place a full year prior to States’ adoption of the Outcome Document<sup>937</sup> and, therefore, any references to RtoP made in the course of the situation were pursuant to the way in which RtoP was formulated in the 2001 ICISS Report. The ICISS Report suggested some form of dividing line between the responsibilities of the State and international community, providing that when the ‘State is unable or unwilling’<sup>938</sup> to protect ‘it becomes the responsibility of the international community to act in its place’.<sup>939</sup> In contrast, the Outcome Document establishes a factual threshold<sup>940</sup> for when the most coercive measures should be used, not the point at which the State’s role in protecting populations effectively suspends. Using the situation in Darfur in 2004 as a case study can therefore undermine the *evolving* nature of RtoP in both principle and practice, including significant differences in the formulation of

<sup>928</sup> Outcome Document (n 718), para 139.

<sup>929</sup> Outcome Document, *ibid*.

<sup>930</sup> Bellamy, ‘Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq’ (n 924); Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (n 924); Stahn, ‘RtoP, the ICC and the Libyan Arrests’ (n 818); Stahn, ‘Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’’ (n 818); Payandeh (n 924) and Wheeler, ‘A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit’ (n 924).

<sup>931</sup> Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’, *ibid*.

<sup>932</sup> Stahn, *ibid*, 116.

<sup>933</sup> Bellamy, ‘Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq’ (n 924).

<sup>934</sup> Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm’ (n 924), 117.

<sup>935</sup> Wheeler, ‘A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit’ (n 924), 8.

<sup>936</sup> Bellamy, ‘Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq’ (n 924), 43; Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm’ (n 924), 117 and Wheeler, *ibid*, 9.

<sup>937</sup> They specifically refer to State positions on UNSC Res 1556 (30 July 2004) UN Doc S/RES/1556(2004) which are available in the UNSC, UNSC Verbatim Record (30 July 2004) UN Doc. S/PV.5015.

<sup>938</sup> ICISS Report (n 727), 17.

<sup>939</sup> ICISS Report, *ibid*.

<sup>940</sup> That is, the Outcome Document provides that the international community can take collective action if national authorities are *manifestly failing* to protect their populations *from RtoP crimes* and peaceful means would be *inadequate* to ensure the populations protection. Outcome Document (n 718), para 139.

primary RtoP's duration.

Second, the argument tends to overlook that primary RtoP has developed as an *ongoing duty* which is capable of being *implemented concurrently* with secondary RtoP. Overlooking this development tends to undermine the multifaceted and persuasive rationale for why primary RtoP has developed in this way. At a legal level, it helps to ensure that primary RtoP is consistent with the *continuity* of existing legal obligations and, therefore, the way in which primary RtoP interacts with the existing international legal order. If primary RtoP suspended upon secondary RtoP's activation then the primary RtoP duty would weaken States' existing obligations, including those which primary RtoP seeks to strengthen the implementation of (e.g. human rights law). The UNSG<sup>941</sup> and Switzerland<sup>942</sup> have alluded to this implication, arguing that:

'[I]t is important to stress that the obligations of States with regard to international law *exist regardless* of the emergence of a situation in which the concept of responsibility to protect may come into play. These obligations *cannot and must not be diluted*. It should also be emphasised that although the concept contains numerous existing international law obligations, it remains a political concept and does not in itself constitute a new norm. Nor does it have the effect of *dispensing States* from their conventional and customary law obligations with regard to human rights law, international humanitarian law and refugee law'.<sup>943</sup>

At a practical and policy level, formulating primary RtoP as a non-continuing duty would have suggested that, once secondary RtoP is activated, States are discharged from the protective duties they owe to their populations under existing international law. This could undermine the practical discharge of secondary RtoP which can rely on the State *permitting* international efforts to protect the population. For example, States can be required to permit access to humanitarian agencies as part of their duty to respect populations' right to adequate food.<sup>944</sup> Similarly, UN observer missions largely depend upon the cooperation of national authorities for certain issues,<sup>945</sup> such as providing them with security whilst they travel in the State.<sup>946</sup> Formulating primary RtoP as an ongoing duty which can be implemented concurrently with secondary RtoP can therefore help to make the RtoP framework more

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<sup>941</sup> The UNSG notes that '[t]he Summit's enunciation of the responsibility to protect was not intended to detract in any way from the much broader range of obligations existing under international humanitarian law, international human rights law, refugee law and international criminal law'. UNSG Report 2009, Implementing RtoP (n 720), 5.

<sup>942</sup> Statement of the Representative of *Switzerland* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

<sup>943</sup> Statement of the Representative of *Switzerland*, *ibid*.

<sup>944</sup> On this see UN Committee on Economic, Social and Cultural Rights, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food' (n 830), para 19.

<sup>945</sup> The UNSC authorisation to deploy a UN Observer Mission to Syria is a principal example. See UNSC Res 2043 (n 870), paras 7-9 and 11.

<sup>946</sup> Not least because it is States who are required to guarantee the security and safety of UN personnel. See particularly, UNSC Res 2043, *ibid*, para 11.

politically palatable to States, not least because it provides for the State to retain some role regarding the way in which *certain* secondary RtoP measures are discharged. At the same time, the concept of concurrent responsibility reduces the prospect of secondary RtoP's discharge being hindered by a refusal of States to cooperate with the measures put in place by the international community.

## 2.4 The Value Added of Primary RtoP

Present practice upholds the view that States can implement primary RtoP through obligations under human rights, criminal and humanitarian law.<sup>947</sup> However, this writer would argue that practice equally suggests that primary RtoP *does not* just restate States existing human rights, criminal and humanitarian law obligations<sup>948</sup> but, rather, could add value to these obligations in four ways. Each way merits individual reflection.

### 2.4.1 Strengthens and/or Clarifies the Requirements of Existing Rights/Obligations in an RtoP Context

Primary RtoP appears to add value to the existing mechanisms to which it relates by strengthening and/or clarifying the specific requirements of existing rights/obligations in an RtoP context. In so doing, primary RtoP can be compared to the collection of human rights instruments which have clarified the requirements of the fundamental rights/obligations contained in the International Bill of Rights in more specific contexts. Examples include the Convention on the Elimination of All Forms of Discrimination against Women,<sup>949</sup> the Convention on the Rights of the Child<sup>950</sup> and the UN Declaration on the Rights of Persons

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<sup>947</sup> D Miller, 'The Responsibility to Protect Human Rights' (Memo for the Workshop on Global Governance, Princeton University, February 2006) <[http://www.princeton.edu/~pcgglobal/conferences/.../Session6\\_Miller.pdf](http://www.princeton.edu/~pcgglobal/conferences/.../Session6_Miller.pdf)> accessed 10 October 2010; Groves (n 872); McClean (n 853); L Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 *Review of International Studies* 445, 448; Mooney (n 755), 84; Cohen, 'Reconciling RtoP with IDP Protection' (n 755), 26 and H Slim, 'Value versus Power: Responsible Sovereignty as Struggle in Zimbabwe' (2010) 2 *GRtoP* 150. It also supports the view that primary RtoP is based upon the existing legal obligations of States under international human rights, humanitarian and criminal law. On this view, see e.g. E Strauss, 'A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect' in Bellamy, Davies and Glanville (n 854) 48-51; A Bellamy and R Reike 'The Responsibility to Protect and International Law' in Bellamy, Davies and Glanville (n 854) 89-94 and Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 924), 118.

<sup>948</sup> This view is taken by a number of commentators, including A Hehir, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention* (Palgrave Macmillan, Basingstoke 2012) 74; Strauss, *ibid.*, 48-51; Bellamy and Reike, *ibid.*, 89-94 and Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *ibid.*

<sup>949</sup> CEDAW (n 754).

<sup>950</sup> UNGA Res 44/25, 'Convention on the Rights of the Child' (1989) UN Doc A/44/49. (Convention on the Rights of the Child).

Belonging to National or Ethnic, Religious or Linguistic Minorities.<sup>951</sup> To illustrate the way in which primary RtoP achieves this, reference can be made to the right to adequate food and water, non-discrimination, children's rights and freedom of expression.

Primary RtoP *strengthens* States' duties with regard to rights to adequate food and water because it subsumes these duties into the specific context of preventing and protecting populations from RtoP crimes. One example is that of national authorities permitting access to humanitarian personnel/aid as a means of implementing primary RtoP. The case study of Burma suggests that States duty to respect populations' right to adequate food by ensuring that humanitarian aid is equally distributed amongst all sections of the population, irrespective of ethnicity or other feature,<sup>952</sup> *bears increased significance* under primary RtoP. To this end, it will be recalled that the Burmese authorities' refusal of entry to humanitarian agencies and their inequitable distribution of humanitarian aid among the population, was considered to be an act which *could amount* to a crime against humanity.<sup>953</sup> Thus, in an RtoP context States obligation to distribute humanitarian aid on a non-discriminatory basis is necessary to effectively fulfil their obligation to respect the rights to adequate food and water *and* prevent the perpetration of RtoP crimes on their territory.

The right to non-discrimination is the second example. Primary RtoP appears to supplement the way in which this right has been tailored in practice following the adoption of the International Bill of Rights to meet the needs of particular individuals by contouring, albeit implicitly, the specific requirements of the right to non-discrimination in an RtoP context. A cross-cutting theme in the UNSG's 2009 Report on Implementing RtoP is the way in which adequate protection of the right to non-discrimination can help to prevent RtoP crimes from arising or re-arising. A case in point is the recommendation that national authorities ensure that the judiciary is free from *gender discrimination*.<sup>954</sup> This helps to define the key requirements of women's right to non-discrimination in an RtoP context by encouraging national authorities to ensure that gender bias does not inhibit holding the perpetrators of all forms of RtoP crimes to account.

A further example is the proposal for States to take steps to rehabilitate and reintegrate child soldiers within the community.<sup>955</sup> The effective implementation of children's rights bear increased significance in an RtoP context, not least because of the interplay between

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<sup>951</sup> UNGA, 'Declaration on the Rights of Persons Belonging to National, Ethnic, Linguistic or Religious Minorities' (n 748).

<sup>952</sup> See e.g. Committee on Economic, Social and Cultural Rights, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food' (n 830), para 18.

<sup>953</sup> See e.g. E C Luck, Testimony before Subcommittee on International Development, Foreign Assistance, Economic Affairs and International Environmental Protection Committee on Foreign Relations, US Senate, 17 June 2008 cited in Cohen, 'Reconciling RtoP with IDP Protection' (n 755), 25 and EP Res, 'Tragic Situation in Burma' (n 761), para K.

<sup>954</sup> UNSG Report 2009, Implementing RtoP (n 720), 12.

<sup>955</sup> UNSG Report 2009, Implementing RtoP, *ibid*, 11 and 14.

using children in armed hostilities and the perpetration of RtoP crimes. The proposals for national authorities to rehabilitate and reintegrate children returning from participation in hostilities is therefore not only important for upholding a child's rights to be protected from violence<sup>956</sup> and to be protected in times of war,<sup>957</sup> but also for preventing RtoP crimes being committed by, and against, the child soldier. Rehabilitating and reintegrating child soldiers can help to overcome the risk that they will return to the armed group/military and commit further RtoP crimes against the general population. At the same time, taking the said steps can help to prevent the perpetuation of a specific RtoP crime within the State, namely the use of child soldiers.

Primary RtoP also reinforces, perhaps further clarifies, the requirements for the *legitimate curtailment of rights* by the State. A useful example is the right to freedom of expression. The UNSG praised the Kenyan authorities for banning live media broadcasts during the election violence in order to prevent any further inflammatory hate speech being used within political broadcasts.<sup>958</sup> This suggests that primary RtoP reinforces that the enjoyment of the right carries 'special duties and responsibilities'<sup>959</sup> because it should not undermine respect of the rights of others,<sup>960</sup> specifically by suggesting that inflammatory expression could *incite* the perpetration of RtoP crimes.<sup>961</sup> Furthermore, it strengthens the requirement for the curtailment of the right to adhere to the test of necessity and proportionality.<sup>962</sup> To this effect, Kenya's ban on broadcasts in order to prevent further RtoP crimes being incited by political officials was restricted to *live* broadcasts only.<sup>963</sup>

In contrast, the case studies of Libya and Syria serve to remind national authorities that, wherever possible, they should take steps to ensure that the right to freedom of expression can be fully enjoyed within the State in order to 'reduce the likelihood of crimes relating to the responsibility to protect being planned and carried out'.<sup>964</sup> The heightened significance of the right to freedom of expression in an RtoP context stems the fact that some States may (i) curtail enjoyment of the right to freedom of expression by perpetrating RtoP crimes against the population; and/or (ii) interfere with the right in order to prevent the population from alerting the international community that RtoP crimes are being committed within the territory by State or non-State actors. To this effect, we should recall that it was the population's exercise of the right to freedom of expression that partly triggered the

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<sup>956</sup> Convention on the Rights of the Child 1989 (n 950) art 19.

<sup>957</sup> *ibid*, arts 38 and 39.

<sup>958</sup> UNSG Report 2009, Implementing RtoP (n 720), 24.

<sup>959</sup> ICCPR (n 721) art 19 (3).

<sup>960</sup> *ibid*, art 19 (3) (a).

<sup>961</sup> The Outcome Document expressly provides that States should prevent RtoP crimes 'including their incitement'. Outcome Document (n 718), para 138.

<sup>962</sup> ICCPR (n 721) art 19 (3). See further, Committee on Civil and Political Rights, 'Article 19: Freedoms of Opinion and Expression, General Comment No.34' (12 September 2011), 8.

<sup>963</sup> UNSG Report 2009, Implementing RtoP (n 720), 24.

<sup>964</sup> Report of the UN Secretary-General, *ibid* at 11.



commission of RtoP crimes by the Libyan and Syrian national authorities.<sup>965</sup> Furthermore, we should bear in mind that it was in response to the population's efforts to inform the international community of the commission of RtoP crimes that these authorities violated the right to freedom of expression (e.g. efforts to shut down telephone lines and/or internet connections).<sup>966</sup>

#### 2.4.2 Extending Obligations to Cover States who are Not Parties to all Relevant Treaties

Primary RtoP may also add value by extending protective obligations to cover States who are not parties to all the relevant treaties. Whilst there has undoubtedly been a high take-up of relevant treaties among States, ratification has not been entirely universal. One example is Kenya which has not ratified the Genocide Convention<sup>967</sup> but, nevertheless, has acted in accordance with primary RtoP to some extent. As noted earlier, Kenya took steps to prevent RtoP crimes from re-arising by criminalising genocide in national law in the International Crimes Act.<sup>968</sup> A further example is the US which is not a State party to the Rome Statute but, nevertheless, supported the UNSC's referral of the situation in Libya to the ICC.<sup>969</sup>

To some extent acting in accordance with primary RtoP may be due to the fact that certain treaty obligations, like the prevention of genocide, have become part of customary international law. However, this does not mean that primary RtoP's expansion of these obligations to non-State parties has no significance. Interaction with primary RtoP by States who are not parties to all the relevant treaties like Kenya can, in the longer term, provide evidence of supportive State practice for primary RtoP's development as new customary international law.<sup>970</sup> In the interim, acting in accordance with primary RtoP reinforces the prevention of, and protection against, RtoP crimes as at least universal moral and/or political obligations. Furthermore, the above examples tend to reinforce Luck's argument that, despite being 'largely based on existing obligations',<sup>971</sup> the Outcome Document represents a 'major

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<sup>965</sup> With regard to Libya see UNHRC, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya' (n 785), 49-54. In relation to Syria see UN Press Release, 'Special Advisers on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, release Statement Marking a Full Year of Violent Suppression of Anti-Government Protests in Syria' (n 785).

<sup>966</sup> On Libya see UNHRC, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya', *ibid*, 49-50. On Syria see UNHRC, 'Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic' (n 785), 8.

<sup>967</sup> UN Treaty Series, 'Status of the Convention on the Prevention and Punishment of the Crime of Genocide 1948' <[http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-1&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&lang=en)> accessed 16 June 2012.

<sup>968</sup> International Crimes Act 2008 (Act No. 16 of 2008, entry into force 9 January 2009) art 5 (1) (a) and (6).

<sup>969</sup> UNSC Res 1970 (n 728), paras 4-8 and Statement of the Representative of the *United States* to the UN Security Council, UNSC Verbatim Record (26 February 2011) UN Doc S/PV.6491.

<sup>970</sup> Primary RtoP's legal status is discussed in chapter six.

<sup>971</sup> Luck, 'The United Nations and the Responsibility to Protect' (n 920), 3.

step forward in the protection of fundamental human rights'<sup>972</sup> because it was accepted by 'a number of countries that had not been State parties to the relevant human rights, humanitarian and refugee conventions'.<sup>973</sup>

#### 2.4.3 Broadens Reach of Relevant Obligations to Go Beyond States to the International Community

A further significant way in which primary RtoP can represent added value is by broadening the reach of relevant obligations beyond States to the international community. A good example of this relates to the capacity for primary and secondary RtoP to be implemented concurrently. This seems to go further than the co-operation that occurs between the State and international community within existing practice, such as in inter-ethnic conflicts.<sup>974</sup> Here, co-operation between the State and international community toward protection may occur *during and after* the harm at issue has arisen. For example, during the conflict the State and international community may co-operate to negotiate an end to the conflict and, post-conflict, States may co-operate with the international community to prosecute relevant persons and return internally displaced persons/refugees.<sup>975</sup> Accordingly, it would appear that RtoP and wider minority protection practice somewhat overlap by both entailing the State and international community co-operating to amend the situation.

However, the *duty* under existing minority protection obligations is placed *only upon the State*. The international community has therefore not cooperated with the State in instances of inter-ethnic conflict because the international community bears *an individual responsibility* to do so. In contrast, cooperation between the State and the international community under RtoP is by reason of the State and the international community each having a responsibility to protect populations.<sup>976</sup> Consequently, the concurrent implementation of primary and secondary RtoP can be distinguished from existing practice because RtoP is unique in allowing for a *dual bearer* of protection. Consequently, concurrent

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<sup>972</sup> Luck, *ibid*.

<sup>973</sup> Luck, *ibid*.

<sup>974</sup> For a comprehensive account of the subsistent nature of minority protection standards in inter-ethnic conflict, see e.g. Nasic, 'Minority Rights Instruments and Mechanisms: Minority Protection along the Conflict Continuum' (n 882), 40.

<sup>975</sup> Nasic discusses these stages of conflict in a minority protection context in a similar manner. Nasic, *ibid*.

<sup>976</sup> Outcome Document (n 718), paras 138 and 139. Stahn would argue that the international community having a positive duty to cooperate to protect populations could represent value added to third States duty to cooperate under the law on State responsibility because the ILC Articles on State Responsibility 'subjected the entire concept of an obligation to cooperate to an express caveat', noting that 'it is open to question whether general international law at present prescribes a positive duty of cooperation and conceded in that respect that' the provision on this 'may represent the progressive development of international law'. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (n 924), 115 and 116. On this see also Payandeh (n 924), 510-513.

implementation of R2P can be seen to represent value added because the international community acts under its own responsibility to protect, not just to help the State implement its duty to protect.

#### 2.4.4 Primary RtoP may develop to Create New Rights/Obligations

Primary RtoP could also be distinguished from the existing obligations it subsumes and provide value added if it were to develop to entail a corresponding collective *right* of populations to protection from RtoP crimes. A proposal made within the UNSG's 2009 Report provides some basis for this suggestion. The UNSG recommended that:

‘States could also assist the Human Rights Council in sharpening its focus as a forum for considering ways to encourage States to meet their obligations *relating* to the responsibility to protect and to monitor, on a universal and apolitical basis, their performance in this regard. To that end, the Council’s universal periodic review mechanism could be an important instrument for advancing human rights and, *indirectly*, goals relating to the responsibility to protect’.<sup>977</sup>

The italicised terms seem to suggest that, were this recommendation to be implemented, the UNHRC would not be used to *directly* assess State implementation of RtoP. However, even *indirectly* bringing RtoP within the UNHRC's mandate provides its members with the opportunity to examine whether a State has implemented primary RtoP effectively. In view of the *human rights* mandate of the UNHRC, this writer would suggest that the recommendation therefore raises the possibility that, were it to be implemented, primary RtoP could develop into a *collective right* of populations to be protected from RtoP crimes. To this end, it is important to recall that the UNHRC is charged with examining how States have implemented their human rights obligations, not whether they have implemented measures to protect their populations from RtoP crimes.<sup>978</sup> Furthermore, the possibility that primary RtoP could develop to entail a collective right to protection appears to have been contemplated by at least Monaco<sup>979</sup> and Nicaragua.<sup>980</sup> On the one hand, Monaco's argument that RtoP ‘should become a right as soon as possible’<sup>981</sup> suggests that it is open to primary RtoP developing in this manner. On the other hand, Nicaragua questioned RtoP's

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<sup>977</sup> UNSG Report 2009, Implementing RtoP (n 720), 11, emphasis added.

<sup>978</sup> UNGA Res 60/251, ‘Human Rights Council’ (3 April 2006) UN Doc A/RES/60/251, paras 2 and 3. (UNGA Res 60/251).

<sup>979</sup> Statement of the Representative of *Monaco* to the UNGA in UN Press Release, ‘More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 743).

<sup>980</sup> Statement of the Representative of *Nicaragua* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

<sup>981</sup> Statement of the Representative of *Monaco* to the UNGA in UN Press Release, ‘More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 743).

acceptability because of its potential correspondence to a collective right to protection.<sup>982</sup> Nicaragua recalled that secondary RtoP ‘allows for the possibility of the use of force’<sup>983</sup> and that this could result in it being discharged contrary to ‘well-established principles in the Charter, such as non-intervention in the internal affairs of States’.<sup>984</sup>

The development of the field of minority protection provides a useful framework under which to consider the potential impediments to, and implications of, primary RtoP developing to entail a collective right to protection. Chapter one noted that minority rights are typically conferred upon individual persons belonging to a minority<sup>985</sup> because of a concern that conferring the rights upon the minority *group* could encourage territorially cohesive minorities to move from (i) claims for their identity to be protected on a par with that of the majority; (ii) to claims for the establishment of some form of autonomous arrangement in the territory of the State; and ultimately (iii) to claims for the right to secede from the existing State.<sup>986</sup> The field of minority protection therefore suggests that whether States would accept primary RtoP to entail a corresponding collective right to protection could be influenced by who are identified as the beneficiaries of the collective right.

On the one hand, the collective right could be conferred on and enforced by distinct groups within a State. The principal policy reservation regarding to this approach in the context of minority protection is that it can create “centrifugal tendencies”.<sup>987</sup> To this effect, collective rights which are conferred on and enforced by distinct groups are considered to strengthen the group’s individual member’s sense of loyalty and commitment to the group.<sup>988</sup> This can lead to the group being seen as an entity which is distinct from broader society and the State as a whole.<sup>989</sup> The requirement for the group to enforce the right can effectively encourage the group’s individual members to depend upon the group, rather than the State, for the protection that the right aims to provide.<sup>990</sup> Formulating a collective right to

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<sup>982</sup> The Representative has stated: ‘The concept, which allows for the possibility of the use of force, could run counter to well-established principles in the Charter, such as non-intervention in the internal affairs of States and the non-use of force in international relations. We wonder how to view the claim that there is a right to the responsibility to protect and to delegate the authority of implementing it to the Security Council — in other words, to the five permanent member States’. Statement of the Representative of *Nicaragua* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

<sup>983</sup> Statement of the Representative of *Nicaragua* to the UNGA, *ibid*.

<sup>984</sup> Statement of the Representative of *Nicaragua* to the UNGA, *ibid*.

<sup>985</sup> As an exception, see the right to existence which is conferred on the minority as a collectivity under UNGA, ‘Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities’ (n 748) art 2 (1).

<sup>986</sup> On this issue see M Weller (ed), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP, Oxford 2005) 623. See further, W Kymlicka, ‘The Internationalisation of Minority Rights’ (2008) 6 (1) *ICON* 1 and H Quane, ‘Rights in Conflict? The Rationale and Implications of Using Human Rights in Conflict Prevention Strategies’ (2007) 47 *VA. J. Int’l L.* 463, 499.

<sup>987</sup> Quane, *ibid*, 499.

<sup>988</sup> Quane, *ibid*.

<sup>989</sup> Quane, *ibid*.

<sup>990</sup> As Quane explains ‘[t]he fact that the individual is dependent on the group for the exercise and enforcement of these rights can have significant implications. It can reinforce the sense of the allegiance to the group which can, in turn, heighten inter-communal differences and impede the development of a sense of common citizenship. It can also encourage members to look to the group to protect their interests rather than to the State’. Quane, *ibid*.

protection in this way could be particularly controversial due to the interplay between primary and secondary RtoP. A collective right to protection in the RtoP framework could effectively have *two bearers*. The State would have the responsibility to comply with the duties associated with the collective right (primary RtoP) but, if the primary RtoP duty was not complied with, the international community would have the responsibility to take action to ensure that the population benefit from the protection provided by the collective right (secondary RtoP). In view of this interplay, a collective right to protection conferred on and enforced by a distinct group within the State would likely only compound States reservations that this formulation of collective rights could lead to challenges to their sovereignty and territorial integrity (e.g. claims to secession). Indeed, Nicaragua's<sup>991</sup> argument seems to overlap, albeit implicitly, with the general perception that collective rights which are conferred on and enforced by distinct groups can create 'centrifugal tendencies'<sup>992</sup> and thereby lead to challenges to a State's sovereignty and territorial integrity. This is especially true when the States duty is expressly propped up by a protective responsibility of external actors, like secondary RtoP.<sup>993</sup> To this end, a collective right to protection in the RtoP framework would not only entail the risk of distancing a group from the State as a whole, it would *actively encourage* them to look beyond the State and to the international community. This is due to primary RtoP being backed up by secondary RtoP which can involve the use of armed force to protect populations.<sup>994</sup> Furthermore, this formulation of a collective right to protection would also entail the more general difficulty of determining *which* particular groups should be recognised as beneficiaries of the right. This would be a complex task, requiring that a judgment be made concerning which groups are *most in need* of protection from RtoP crimes.

On the other hand, a collective right to protection could be conferred upon individual members of the population and enforced by the population as a whole. States could be apprehensive over this approach because it raises questions with regard to who the population would look to for protection when the State failed to comply with the collective right. Admittedly, this would not be ambiguous in an RtoP context. The clear interplay between primary and secondary RtoP suggests that the population could and should look to the international community for protection. However, research into the formulation of collective rights more generally suggests that this would not appease all States concerns. As

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<sup>991</sup> Statement of the Representative of *Nicaragua* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100. This view was outlined above.

<sup>992</sup> Quane (n 986), 499.

<sup>993</sup> Outcome Document (n 718), para 139.

<sup>994</sup> Outcome Document, *ibid* [referring to Chapter VII of the UN Charter, Article 42 of which permit's the UNSC to authorise the use of armed force].

Donnelly<sup>995</sup> explains, '[i]n the case of a right held by a people, or by society as a whole, the most plausible 'person' to exercise the right is, unfortunately, the State'.<sup>996</sup> This is a reasonable outcome of rights enforced by the population as a whole because it is the State who would naturally be looked upon to represent its population. However, the effectiveness of a collective right to protection from RtoP crimes could be undermined if it was formulated in this way because of the fact that State actors can often be implicated in the perpetration of RtoP crimes and, therefore, violations of the collective right.

### 3 Monitoring Compliance with Primary RtoP

Primary RtoP's interplay with States existing legal obligations, such as the prevention of genocide and international humanitarian law, means that there can be consequences for a failure to comply with the duty. A principal example is that individual criminal responsibility can arise when State actors incite or otherwise perpetrate RtoP crimes. This was made clear by the Special Adviser on the Prevention of Genocide (SAPG) in Kenya. Recalling the Kenyan authorities primary RtoP duty, the SAPG 'noted that political and community leaders may be held accountable for violations of international law committed at their instigation'.<sup>997</sup>

However, there is the question of whether there can be accountability for a failure to enforce the primary RtoP duty *itself*. What, for example, is to happen in the event that national authorities fail to prevent RtoP crimes by taking relevant steps to guard against their commission? Are there any mechanisms which can be used to monitor State compliance with primary RtoP as a duty for preventing and protecting against mass atrocity crimes *outside* the context of the existing obligations that it subsumes? Few recommendations have so far been made concerning how to ensure that States comply with primary RtoP as a duty in its own right. However, four developments should be considered.

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<sup>995</sup> J Donnelly, 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15 Calif. Western Int. L. J. 473, 482 reprinted in Steiner (n 883) 1449-50.

<sup>996</sup> Donnelly writes: 'A further problem with collective human rights is determining who is to exercise the right; the right-holder is not a physical person, and thus an institutional 'person' must exercise it. In the case of a right held by a people, or by society as a whole, the most plausible 'person' to exercise the right is, unfortunately, the State. Again this represents a radical reconceptualisation of human rights – and an especially dangerous one'. Donnelly, *ibid* in Steiner, *ibid*, 1450.

<sup>997</sup> Statement of the UN Special Adviser to the UNSG on the Prevention of Genocide, 'The Situation in Kenya' (28 January 2009) cited in UN Department of Public Information, 'The United Nations and Kenya: Briefing Note' (7 February 2008) <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya>> accessed 17 June 2012.

### 3.1 National RtoP Advisers

The first development that we should consider is the 2010 proposal of twenty one States to appoint senior officials to serve as national advisers on RtoP<sup>998</sup> and the commitment to create a ‘standing network of officials dedicated to improve global efforts to prevent atrocities’.<sup>999</sup> Both initiatives entail the *potential* to act as enforcement mechanisms for RtoP but we cannot yet be certain that either will contribute effectively to the implementation of primary RtoP. Admittedly, national RtoP advisers have been appointed by Denmark and Ghana and, at the time of writing, thereafter appointed by another fifteen States. Whilst the national RtoP adviser mandates encompass the development of national mechanisms and bodies for preventing RtoP crimes, it remains unclear whether this relates to bolstering national strategies to prevent RtoP crimes in (i) third States, under secondary RtoP; or (ii) nationally, through the discharge of primary RtoP.

### 3.2 The UN Human Rights Council

The preceding section discussed at length the recommendation to use the UNHRC, particularly its Universal Periodic Review mechanism, as a forum for examining States compliance with primary RtoP.<sup>1000</sup> This writer would suggest that mandating the UNHRC with this task would effectively enable it to be used as a mechanism for monitoring State compliance with primary RtoP. There are reasons to approach the implementation of this recommendation cautiously in order to avoid undermining both the RtoP framework and the UNHRC, however. Reference can be made here to Morocco’s response to the recommendation. The representative argued that using the UNHRC to monitor State compliance with primary RtoP could diminish the ‘credibility’<sup>1001</sup> and ‘viability’<sup>1002</sup> of the UNHRC’s Universal Periodic Review mechanism. This alludes to the view that the UNHRC

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<sup>998</sup> The decision to introduce this position arose from the September 2010 meeting of twenty-one Heads of State on the issue of “Fulfilling the responsibility to protect: Strengthening our capacities to halt and prevent mass atrocities”. This was led by Denmark and Ghana in co-operation with the Global Centre on the Responsibility to Protect. The ministerial meeting was attended by seven African States, seven European States, four from the Americas and three from the Asia-Pacific. For these and other details about the meeting see the Global Centre for the Responsibility to Protect ‘Meeting Summary – Fulfilling the Responsibility to Protect: Strengthening our Capacities to Halt and Prevent Mass Atrocities’ (n 850) and Joint Press Statement by the Ministers of Foreign Affairs of Ghana and Denmark (27 September 2010)

<<http://www.um.dk/da/servicemenu/Nyheder/ForsideNyheder/PRESSEMEDDELELSE>> accessed 20 November 2010. (Joint Press Statement by the Ministers of Foreign Affairs of Ghana and Denmark).

<sup>999</sup> Joint Press Statement by the Ministers of Foreign Affairs of Ghana and Denmark, *ibid*.

<sup>1000</sup> The UNSG Report directed that: ‘States could also assist the Human Rights Council in sharpening its focus as a forum for considering ways to encourage States to meet their obligations relating to the responsibility to protect and to monitor, on a universal and apolitical basis, their performance in this regard. To that end, the Council’s universal periodic review mechanism could be an important instrument for advancing human rights and, indirectly, goals relating to the responsibility to protect’. UNSG Report 2009, Implementing RtoP (n 720), 11.

<sup>1001</sup> Statement of the Representative of *Morocco* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

<sup>1002</sup> Statement of the Representative of *Morocco* to the UNGA, *ibid*.

is too politicised to be efficient because it can often prioritise politics over the effective discharge of its human rights mandate, an issue considered to be facilitated by the UNHRC's bloc voting structure.<sup>1003</sup> The most pertinent example of the politicisation of the UNHRC is the way in which it prioritises the matter of Israel-Palestine over other States of concern, such as the situation in the Democratic Republic of Congo which is estimated to have 'claimed 1,000 more victims'.<sup>1004</sup>

To a certain extent, the politicisation of the UNHRC comes through in its practice on RtoP to date. Admittedly, the UNHRC has shown some willingness to recall the primary RtoP duty of States, not least in the case studies of Libya<sup>1005</sup> and Syria.<sup>1006</sup> However, in other case studies issues of realpolitik have influenced the UNHRC's role under the RtoP framework. A useful comparison is the UNHRC's role in the case studies of Darfur and the Israel-Gaza conflict. In the former case, prominent regional organisations like the Arab League<sup>1007</sup> and the OIC<sup>1008</sup> criticised the UNHRC's decision to use the RtoP framework as a tool for assessing the situation of human rights in Darfur.<sup>1009</sup> In contrast, there was no dissent over the specific references to RtoP in the final Report of the fact-finding mission on the Israel-Gaza conflict.<sup>1010</sup> Accordingly, mandating the UNHRC to monitor State compliance with primary RtoP could serve to further politicise its working methods. To this effect, the mandate could in practice lead the UNHRC to examine whether *particular* States are complying with primary RtoP (e.g. Israel), whilst overlooking other States of concern. It could be injudicious, perhaps even dangerous, to mandate such a politicised body with a role in monitoring primary RtoP compliance, given that a finding that a State has breached primary RtoP is linked to secondary RtoP's activation (including through the use of armed force).<sup>1011</sup>

Arguably, this risk could explain why there is a divide in State views regarding the role

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<sup>1003</sup> On this issue, see e.g. E Heinze, "The Reality and Hyper-Reality of Human Rights: Public Consciousness and the Mass Media" in R Dickinson, E Katselli, C Murray and O W Pederson (eds), *Examining Critical Perspectives on Human Rights* (CUP, Cambridge 2012) 202-208. Gierczyk also discusses the practical functioning of the Human Rights Council, including its Universal Periodic Review mechanism. See Gierczyk (n 854), 115-117.

<sup>1004</sup> Heinze, *ibid.*, 202.

<sup>1005</sup> UNHRC Res S-15/1 (n 728), para 2.

<sup>1006</sup> UNHRC Res S-16/1 (n 729), para 1.

<sup>1007</sup> Statement of the Representative of Algeria (*on behalf of the Arab League*) to the UNHRC in UN Press Release, 'Human Rights Council Discusses Report of High-Level Mission on Situation of Human Rights in Darfur' (16 March 2007) UN Doc HRC/07/12

<<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/E6DF2E2811EABFA3C12572A000717B7E?opendocument>> accessed 12 November 2011. (UN Press Release, 'Human Rights Council Discusses Report of High-Level Mission on Situation of Human Rights in Darfur').

<sup>1008</sup> Statement of the Representative of Pakistan (*on behalf of the Organisation of the Islamic Conference*) to the UNHRC, *ibid.*

<sup>1009</sup> UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur' (9 March 2007) UN Doc A/HRC/4/80. ('Report of the High-Level Mission on the Situation of Human Rights in Darfur').

<sup>1010</sup> UNHRC, 'Report of the UN Fact-Finding Mission on the Gaza Conflict: Conclusions and Recommendations' (15 September 2009) UN Doc A/HRC/12/48, 531. (UNHRC, 'Report of the UN Fact-Finding Mission on the Gaza Conflict: Conclusions and Recommendations').

<sup>1011</sup> Outcome Document (n 718), para 139.



that the UNHRC should have with regard to primary RtoP. Notably, the divide is along geopolitical lines. At one side stand European States and the US.<sup>1012</sup> The standpoint taken by these States is that the UNHRC should be used only to “promote”<sup>1013</sup> or “advance”<sup>1014</sup> primary RtoP. This suggests that these States consider that the UNHRC’s role should be one of *endorsement*, encouraging States to comply with primary RtoP when considering States’ implementation of *human rights*. At the other side stand Latin American and Asian States.<sup>1015</sup> This group welcomes using the UNHRC to enforce primary RtoP. For example, Panama argues that the UNHRC should be used as a forum through which ‘to monitor’<sup>1016</sup> how States ‘comply with their obligations *under* the responsibility to protect’.<sup>1017</sup> This latter reference seems to suggest that these States may support primary RtoP developing to entail a collective right to protection. Primary RtoP does not *exclusively* relate to States’ implementation of international human rights law but, rather, requires that States comply with humanitarian law and ensure individual criminal responsibility for breaches of international criminal law. Accordingly, this group of States seem to invite the UNHRC to police compliance with the range of obligations to which primary RtoP relates, rather than encouraging it to use its human rights mandate to examine the way in which States’ implementation of human rights can help it to comply with primary RtoP.

Arguably, the divide in State views could be the result of the position that the respective States have in the UNHRC’s present bloc voting structure and, therefore, the way in which this has led some States to consider that the UNHRC is too politicised to be effective. The cautious approach of the first group of States could possibly be explained by the fact that these States know that they would often be out voted under the UNHRC’s present block voting structure. In the opinion of this writer, the UNSG’s call for primary RtoP compliance to be examined by the UNHRC on a ‘*universal and apolitical basis*’<sup>1018</sup> would be unlikely to overcome these implications.

In addition, a parallel can be drawn between the divide in State views regarding the role

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<sup>1012</sup> Statements of the Representatives of *Norway* and *Luxembourg* to the UNGA in UN Press Release, ‘More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 744); Statement of the Representative of *Slovakia* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statements of the Representatives of the *United States*, *France* and *Italy* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

<sup>1013</sup> Statement of the Representative of *Norway* to the UNGA, *ibid*.

<sup>1014</sup> Statement of the Representative of *Italy* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

<sup>1015</sup> Statement of the Representative of *Panama* to the UNGA in UN Press Release, ‘Delegates Weigh Legal Merits on Responsibility to Protect Concept as General Assembly Concludes Debate’ (n 743) and Statements of the Representatives of *Uruguay*, *Ecuador*, *Japan* and *Pakistan* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

<sup>1016</sup> Statement of the Representative of *Panama* to the UNGA, *ibid*.

<sup>1017</sup> Statement of the Representative of *Panama* to the UNGA, *ibid*, emphasis added.

<sup>1018</sup> The Report directed that: ‘States could also assist the Human Rights Council in sharpening its focus as a forum for considering ways to encourage States to meet their obligations relating to the responsibility to protect and to monitor, *on a universal and apolitical basis*, their performance in this regard. To that end, the Council’s universal periodic review mechanism could be an important instrument for advancing human rights and, indirectly, goals relating to the responsibility to protect’. UNSG Report 2009, Implementing RtoP (n 720), 11.

of the UNHRC in relation to primary RtoP and the similarly geopolitical divide regarding whether there exists a collective right to *development*. Whilst Latin American and Asian States seem to generally accept that this collective right exists, European and North American States argue that development activities should follow a rights-based approach to development.<sup>1019</sup> In turn, the substantive debate over the right to development could provide a framework for grounding the divide in State views over the UNHRC's role in the RtoP framework. To this effect, one group of States seems to recognise that primary RtoP might *entail* a collective right to protection which could be *enforced through* the UNHRC (i.e. a right to protection).<sup>1020</sup> In contrast, another group seems to recognise that States can *cooperate* with the UNHRC concerning their implementation of *existing rights* to fulfil primary RtoP (i.e. a rights-based approach to protection).<sup>1021</sup>

### 3.3 Periodic Review

The UNSG's 2009 Report also recommends establishing a specific review mechanism to assess what States have done to implement RtoP.<sup>1022</sup> Although no States<sup>1023</sup> have expressly rejected or criticised this proposal, there is no express support for it either. Accordingly, in recent times it seems to have disappeared from RtoP discourse. Arguably, had it been accepted by States, it could have been a mechanism through which compliance with primary RtoP could have been monitored and perhaps enforced.

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<sup>1019</sup> On the debate over whether there exists a right to development or whether rights-based approaches should be taken to development, see generally P Uvin, 'From the Right to Development to the Rights-Based Approach: How Human Rights Entered Development' (2007) 17 (4/5) *Development in Practice* 597, especially 598-599 [at which Uvin respectively explains why a right to development appeals to States from the so-called "third world" and, furthermore, alludes to a rights-based approach appealing to other States due to its interplay with democracy as a principle of governance]. On the merits and implications of the proposed approaches, see Minority Rights Group International, 'Minority Rights and Development: Overcoming Exclusion, Discrimination and Poverty' (Paper Submitted to the UN Working Group on Minorities, 29 May 2002) <<http://www.minorityrights.org/810/international-statements/minority-rights-and-development-overcoming-exclusion-discrimination-and-poverty.html>> accessed 12 May 2012. For details of the efforts made to standardise the approaches taken among relevant institutions, see UNHRC, 'The Human Rights Based Approach to Development Cooperation Towards a Common Understanding among the UN Agencies' <[http://www.undg.org/archive\\_docs/6959The\\_Human\\_Rights\\_Based\\_Approach\\_to\\_Development\\_Cooperation\\_Towards\\_a\\_Common\\_Understanding\\_among\\_UN.pdf](http://www.undg.org/archive_docs/6959The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf)> accessed 12 May 2012.

<sup>1020</sup> Statement of the Representative of *Panama* to the UNGA in UN Press Release, 'Delegates Weigh Legal Merits on Responsibility to Protect Concept as General Assembly Concludes Debate' (n 743) and Statements of the Representatives of *Uruguay, Ecuador, Japan* and *Pakistan* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

<sup>1021</sup> Statements of the Representatives of *Norway* and *Luxembourg* to the UNGA in UN Press Release, 'More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (n 744); Statement of the Representative of *Slovakia* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statements of the Representatives of the *United States, France* and *Italy* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

<sup>1022</sup> UNSG Report 2009, Implementing RtoP (n 720), 30.

<sup>1023</sup> However, Indonesia did contend that 'this issue needs a clear and practical modality before a discussion on it takes place in order to ensure a true value added of such exercise'. Statement of the Representative of *Indonesia* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

### 3.4 Security Council Committee / Global Strategy

Finally, the African States of Ghana and Gambia made their own suggestions regarding how to enforce primary RtoP at the UNGA 2009 thematic debate on implementing RtoP. Ghana<sup>1024</sup> proposed that the UNSG devise a Global Strategy/Action Plan for RtoP's implementation. Although the Strategy could reasonably have included consideration of a primary RtoP enforcement mechanism, Ghana did not make any proposals on this. Gambia<sup>1025</sup> made a similar suggestion, recommending the establishment of an RtoP Committee 'mandated to make non-binding recommendations to the General Assembly, the Security Council and regional organisations'.<sup>1026</sup> It is unclear from the statement what the Committee's focus would be but, arguably, it would require the Committee to assess whether the State at issue has complied with primary RtoP and communicate that finding to the appropriate UN or regional organisation. However, neither proposal was discussed further amongst State Representatives and, so far, they have not been explicitly considered for adoption or further development as primary RtoP enforcement mechanisms by any institutional personnel.

There is limited discussion in present RtoP literature of the ways through which to ensure that States comply with primary RtoP as a duty in its own right. Dastoor<sup>1027</sup> does propose a novel enforcement model for the RtoP framework, recommending the establishment of an RtoP UNSC Committee whose members represent all regions<sup>1028</sup> and, to avoid any delay in protection, would not grant members a veto power.<sup>1029</sup> Dastoor's argument generally concerns how the international community should respond to RtoP cases and, therefore, seems focused upon secondary RtoP's enforcement. However, Dastoor does state that '[b]roadly, the RtoP-SCC would be tasked with monitoring situations to which the RtoP doctrine might apply and making specific recommendations to the Security Council regarding appropriate action'.<sup>1030</sup> The present author considers that this raises the possibility that the Committee could be used to police State compliance with primary RtoP. In instances where the State fails to comply, the Committee could make recommendations concerning how the international community may encourage States to fulfil primary RtoP or, indeed,

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<sup>1024</sup> Statement of the Representative of *Ghana* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

<sup>1025</sup> Statement of the Representative of *Gambia* to the UNGA in UN Press Release, 'Delegates Weigh Legal Merits on Responsibility to Protect Concept as General Assembly Concludes Debate' (n 743).

<sup>1026</sup> Statement of the Representative of *Gambia* to the UNGA, *ibid*. For a discussion of this recommendation from the perspective of determining when secondary RtoP has been activated, see N Deller, "Challenges and Controversies" in J Genser and I Cotler (eds), *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time* (OUP, Oxford 2012) 82.

<sup>1027</sup> N Dastoor, 'The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect' (2009) 22 Harv. Hum. Rts. J. 25.

<sup>1028</sup> Dastoor, *ibid*, 50.

<sup>1029</sup> Dastoor, *ibid*.

<sup>1030</sup> Dastoor, *ibid*, 49.

invoke measures against the State to enforce such compliance. However, one could question the viability of establishing the committee. Although Dastoor devotes some time to addressing potential criticisms of the proposal<sup>1031</sup> he overlooks other important matters, not least whether such re-structuring of the UNSC would ever be accepted in practice.

## Conclusion

The chapter's starting point was to highlight that the Outcome Document clearly identifies that '[e]ach individual State'<sup>1032</sup> has a responsibility to protect 'its populations'.<sup>1033</sup> However, whilst the Outcome Document informs us that primary RtoP is to be implemented through 'appropriate and necessary means',<sup>1034</sup> it remains unclear *which* means States should implement in order to fulfil the duty. It was further argued that although the Outcome Document states that the duty entails the 'prevention',<sup>1035</sup> of RtoP crimes, it does not outline *what* States are required to do in order to prevent crimes and, therefore, fails to clarify in an exhaustive manner the scope and character of States duties under primary RtoP. In addition, this writer argued that there is some ambiguity regarding the duration of the primary RtoP duty, not least because the Outcome Document does not specify whether it continues or suspends when secondary RtoP is being applied. These issues formed the general framework of the chapter.

A recurrent theme throughout the chapter was the manner in which primary RtoP has been interpreted and implemented within relevant practice post-World Summit. In doing so, the chapter has shown that primary RtoP has altered substantially from the way in which it was formulated by the ICISS in 2001. One profound change which appears to have occurred concerns the means of implementing primary RtoP. Some of the means proposed by the ICISS<sup>1036</sup> do not appear to be still regarded as central to the discharge of primary RtoP. This is quite likely the result of the substantial difference between the way that the scope of the RtoP framework was outlined within the ICISS Report and the Outcome Document.<sup>1037</sup> The ICISS Report considered RtoP to be a mechanism for protecting populations who had suffered harm from a broad range of acts,<sup>1038</sup> whereas the Outcome Document explicitly focused RtoP upon protecting populations from war crimes, genocide, crimes against

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<sup>1031</sup> These include: the Committee producing 'No New Results'; being 'Too Similar to the General Assembly' and that it is 'An Unrealistic Proposal'. See respectively, Dastoor, *ibid*, 56-60.

<sup>1032</sup> Outcome Document (n 718), para 138.

<sup>1033</sup> Outcome Document, *ibid*.

<sup>1034</sup> Outcome Document, *ibid*.

<sup>1035</sup> Outcome Document, *ibid*.

<sup>1036</sup> For e.g. establishing non-discriminatory property laws. ICISS Report (n 727), 42.

<sup>1037</sup> The evolution of RtoP's scope was outlined in chapter one.

<sup>1038</sup> ICISS Report (n 727), 32-34.

humanity and ethnic cleansing.<sup>1039</sup> As a result, subsequent practice suggests that States should implement means which are directly relevant to protecting populations from RtoP crimes ( e.g. domestic criminalisation of RtoP crimes), as opposed to protecting populations more generally ( e.g. establishing non-discriminatory property laws to ensure that people can reclaim their property in the event that they are displaced by RtoP crimes<sup>1040</sup>).

The primary objective of the chapter was to examine how States could fulfil their primary RtoP duty. It was suggested that States and relevant international actors have proposed that primary RtoP be generally discharged through the implementation of human rights,<sup>1041</sup> criminal law<sup>1042</sup> and humanitarian<sup>1043</sup> obligations. Identifying which means can be used is helpful for both determining how primary RtoP can be implemented and how existing obligations can be most effectively implemented within an RtoP context. For example, the chapter argued that, where appropriate, RtoP practice has called upon States to ensure that they enable populations to have access to humanitarian personnel and aid.<sup>1044</sup> This suggests that the right to adequate food may be most efficiently implemented within an RtoP context by States (i) permitting humanitarian agencies within their territory (Darfur);<sup>1045</sup> and (ii) ensuring that they do not negatively interfere in the distribution of aid (Myanmar).<sup>1046</sup>

Throughout, consideration was given to outlining where present consensus on primary RtoP lies, including the implementation means which have been approved by States. However, we must take care not to place too much emphasis upon consensus alone. Ultimately, so many means have been proposed that it would be near impossible for *each* State to approve *each* measure and, furthermore, we can question the utility of formulating what would essentially be a “chart” of implementation mechanisms. At a conceptual level, this would seem inconsistent with the finding that States enjoy a *margin of appreciation* over which means they use to implement primary RtoP and the way in which this can enable the

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<sup>1039</sup> Outcome Document (n 718), paras 138 and 139.

<sup>1040</sup> ICISS Report (n 727), 40-41.

<sup>1041</sup> UNSG Report 2009, Implementing RtoP (n 720), 5, 6 and 11. See also: Statement of the Representative of Mali to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statements of the Representatives of France, Sweden (*on behalf of the European Union*) and Bosnia and Herzegovina to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97; Statement of the Representative of Hungary to the UNGA in UN Press Release, ‘More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 744) and Statement of the Representative of Jamaica (*on behalf of CARICOM*) to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

<sup>1042</sup> UNSG Report 2009, Implementing RtoP, *ibid*, 12; Statements of the Representatives of Japan and Colombia to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statement of the Representative of Tanzania to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statements of the Representatives of Turkey and Slovenia to the UNGA in UN Press Release, ‘More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’, *ibid* and Joint Statement of Denmark and Costa Rica to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

<sup>1043</sup> EP Res, ‘The Tragic Situation in Burma’ (n 761) and EP Res, ‘Expulsions of NGOs from Darfur’ (n 761).

<sup>1044</sup> EP Res, ‘The Tragic Situation in Burma’ and EP Res, ‘Expulsions of NGOs from Darfur’, *ibid*.

<sup>1045</sup> EP Res, ‘Expulsions of NGOs from Darfur’, *ibid*, paras 3 and F.

<sup>1046</sup> EP Res, ‘The Tragic Situation in Burma’ (n 761), paras 5 and K.

duty to be flexibly implemented in order to meet populations' protection needs in any given situation. Furthermore, there is scope to argue that flexible implementation need not necessarily undermine the level of protection that populations receive. Primary RtoP appears to represent a duty of universal application which entails certain minimum standards, not least that *all* national authorities should not incite or otherwise perpetrate RtoP crimes.

A cross-cutting theme throughout the chapter was the way in which we can draw upon the field of minority protection to provide possible explanations for *why* primary RtoP has evolved in a particular way and the potential *implications* thereof. On the one hand, there appears to be substantial overlap between the scope and character of States duties in both areas. For example, both appear to entail a margin of appreciation and confer ongoing duties of a positive and negative character. Similarly, both areas have attached importance to States effective implementation of the human rights of individual members of the population.<sup>1047</sup>

This relates to one of the ways in which the field of minority protection can be drawn upon to map out potential impediments to the further development of primary RtoP and, furthermore, the way in which primary RtoP could come to represent value added to the existing obligations it subsumes. In addition to the value added that primary RtoP can bring by clarifying the specific requirements of rights/obligations in an RtoP context and extending obligations beyond States to the international community, it was argued that primary RtoP entailed the potential to create new rights/obligations. To date, primary RtoP has not been detailed as a distinct "right". Charging the UNHRC with monitoring State compliance with primary RtoP<sup>1048</sup> therefore seems to exceed its human rights mandate,<sup>1049</sup> not least because primary RtoP also relates to humanitarian and criminal law obligations. Accordingly, this could open the way for primary RtoP to be perceived to entail a *collective right of populations* to protection from RtoP crimes. Drawing upon the development of minority rights, this writer argued that the prospects for this to gain traction among States may be influenced by whether the right is formulated for (i) the benefit of, and enforced by, specific groups; or (ii) the benefit of the population as a whole, and enforced by the State on the populations' behalf. Both can be contentious at a policy level. For example, the explicit interplay between the State and the international community in protecting populations, including through armed force, could exacerbate fears that groups will enforce the right to the detriment of State sovereignty and territorial integrity.<sup>1050</sup>

Primary RtoP could also constructively evolve by building upon the present recommendations for ensuring State compliance with the duty. It will be interesting to

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<sup>1047</sup> For a discussion of the use of individual human rights in the context of minority protection see e.g. S Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?' (2000) 32 N.Y.U.J Int'l L & Pol 591, 600.

<sup>1048</sup> UNSG Report 2009, Implementing RtoP (n 720), 11.

<sup>1049</sup> UNGA Res 60/251 (n 978), paras 2 and 3.

<sup>1050</sup> Weller, *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (n 986), 623; Kymlicka (n 986) and Quane (n 986), 499.

monitor which States follow the lead of Denmark and Ghana<sup>1051</sup> and appoint a national RtoP adviser, in order to assess if and how the advisers mandates alter from State to State and, perhaps most significantly, whether this mandate will incorporate an advisory duty on national implementation of primary RtoP. Additionally, we should closely monitor the ways in which the UNHRC incorporates RtoP into its work. To date its incorporation has been an assortment of political will and tension. On the one hand, the controversy surrounding the use of the RtoP framework as a model for assessing human rights in Darfur<sup>1052</sup> suggests that it may still be a step too far to see the UNHRC as an outlet which its members will consistently permit to be used to examine State compliance with primary RtoP. Conversely, the UNHRC has recalled the primary RtoP duty of certain national authorities,<sup>1053</sup> urged the international community to take action in accordance with secondary RtoP,<sup>1054</sup> and expressly referred to the possibility that RtoP crimes are being committed in specific cases.<sup>1055</sup> In principle, the UNHRC could help enforce primary RtoP because they will often be amongst the first to see potential RtoP crimes emerging.<sup>1056</sup> In practice, the UNHRC has been criticised for allowing politics to influence, and at times dictate, its general functioning.<sup>1057</sup> There is a very real risk that this will endure in RtoP cases, with the UNHRC either failing to take up the mandate proposed, or enforcing it for political rather than protective reasons.

In conclusion, the chapter has argued that practice suggests that primary RtoP is a universal duty which attaches both negative and positive duties to States. The duty can be implemented through a wide range of means but these should be appropriate to the factual context at hand. The duty can be implemented independently or, alternatively, alongside secondary RtoP's assistance or responsive components. These findings raise questions over the broader nature of primary RtoP and secondary RtoP's interplay and, more specifically, the way in which secondary RtoP's practical discharge comes into effect. Is it necessary for RtoP crimes to have *fully* emerged in a State? Or, alternatively, can secondary RtoP be discharged when RtoP crimes are *imminent*? If so, on what basis is the imminence of RtoP crimes to be determined? To what extent, if any, does the activation of secondary RtoP's discharge represent *value added* to the international community's role in protecting populations pre-RtoP? These and other questions are examined in the following chapter.

<sup>1051</sup> Joint Press Statement by the Ministers of Foreign Affairs of Ghana and Denmark (n 998).

<sup>1052</sup> UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur' (n 1009). See particularly: Statements of the Representatives of *Algeria (on behalf of the Arab League)* and *Pakistan (on behalf of the Organisation of the Islamic Conference)* in UN Press Release, 'Human Rights Council Discusses Report of High-Level Mission on Situation of Human Rights in Darfur' (n 1007).

<sup>1053</sup> For e.g. UNHRC Res S-15/1 (n 728), para 2 and UNHRC Res S-16/1 (n 729), para 1.

<sup>1054</sup> See e.g. UNHRC, 'Report of the UN Fact-Finding Mission on the Gaza Conflict' (n 1010), 531.

<sup>1055</sup> For e.g. it noted that there was the possibility of crimes against humanity being committed in Libya and in Syria referred to 'crimes and violations'. See UNHRC Res S-15/1 (n 728), para 1 and UNHRC Res S-16/1 (n 729), para 7.

<sup>1056</sup> Giercyz makes a similar point. Giercyz (n 854), 115.

<sup>1057</sup> Heinze (n 1003), 202-208.

# CHAPTER IV

## THE ACTIVATION OF SECONDARY RtoP

### UNIFORM STANDARD OR SLIDING SCALE?

#### Introduction

The Outcome Document provides that the international community should ‘help’<sup>1058</sup> and ‘encourage’<sup>1059</sup> States to fulfil their primary R2P duty and commits the international community to providing assistance to States ‘before crises and conflicts break out’<sup>1060</sup>. Furthermore, it provides that the international community have a ‘responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VII of the Charter, to help to protect populations’<sup>1061</sup> from RtoP crimes. When national authorities are manifestly failing to protect their populations and peaceful means are inadequate<sup>1062</sup> to ensure populations protection, the Outcome Document provides that the international community should undertake a ‘timely and decisive’<sup>1063</sup> response, in a ‘collective’<sup>1064</sup> manner, ‘in accordance with the Charter, including Chapter VII’<sup>1065</sup>. This chapter analyses the way in which the aforementioned components of secondary R2P have been activated in practice to date.<sup>1066</sup>

The way in which this writer uses the term “activation” should first be explained. As the preceding chapter argued, primary RtoP is an ongoing duty which can be implemented concurrently with secondary RtoP. Accordingly, secondary RtoP’s activation is not a matter of when a State *loses* its duty to protect and the international community *gains* its responsibility to protect<sup>1067</sup> but, instead, of considering when the international community’s

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<sup>1058</sup> UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 138. (Outcome Document).

<sup>1059</sup> Outcome Document, *ibid*.

<sup>1060</sup> Outcome Document, *ibid*, para 139.

<sup>1061</sup> Outcome Document, *ibid*.

<sup>1062</sup> Outcome Document, *ibid*.

<sup>1063</sup> Outcome Document, *ibid*.

<sup>1064</sup> Outcome Document, *ibid*.

<sup>1065</sup> Outcome Document, *ibid*.

<sup>1066</sup> Chapter one outlined the relevant Outcome Document provisions on secondary RtoP and the way in which these provisions were interpreted by the UN Secretary-General to provide for secondary RtoP to entail two pillars: (i) International Assistance and Capacity Building; and (ii) Timely and Decisive Response (entailing peaceful and non-peaceful measures. Report of the UNSG, ‘Implementing the Responsibility to Protect’ (2009) UN Doc. A/63/677, 9-10 and 22. (UNSG Report 2009, Implementing RtoP).

<sup>1067</sup> Chapters one and three outlined that this view is taken by several commentators, such as A Bellamy, ‘Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq’ (2005) 19 *Ethics & International Affairs* 31; C Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (2007) 101 (1) *AJIL* 99; C Stahn, ‘RtoP, the ICC and the Libyan Arrests’ (*The Hague Justice Portal*, 24 November 2011) <<http://www.haguejusticeportal.net/index.php?id=12998>> accessed 12 May 2012; M Payandeh, ‘With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process



practical *application* of secondary RtoP's components *comes into effect*. Accordingly, this chapter's main objective is to explain the basis on which the international community determines that a State's national authorities no longer have the *sole* responsibility for discharging protective measures and should instead (i) be assisted in this endeavour by the international community;<sup>1068</sup> and/or (iii) the international community should undertake a 'timely and decisive'<sup>1069</sup> response through peaceful or non-peaceful protective measures. To achieve this objective, the chapter considers several significant questions regarding the *substantive* and *institutional* aspects of secondary RtoP's activation in practice to date.

Part one considers the substantive aspects of secondary RtoP's activation. This section explains that secondary RtoP's activation can raise issues of a substantive nature. For example, is it necessary for RtoP crimes to be perpetrated in full before activation can occur? Are the legal elements of RtoP crimes drawn upon when determining secondary RtoP's activation? If so, is consideration given to both the *actus reus* and *mens rea* elements of an RtoP crime? Drawing upon trends in practice to date, this writer outlines that secondary RtoP's activation results in a test which can give rise to specific concerns of an *evidential* nature. Consideration is also given to the character of the activating threshold. Is activation based upon a *uniform standard* which spans each of secondary RtoP's respective components? Or, are secondary RtoP's respective components activated on the basis of a *sliding scale*? Do the factors that have been taken into account when determining activation in practice suggest that the Outcome Document effectively codified a *tipping point* when, at least in principle, the international community should take 'appropriate and necessary'<sup>1070</sup> action to protect populations from RtoP crimes?

Part two explores the institutional aspects of secondary RtoP's activation process, not least the issue of *who* decides that activation has occurred in a specific case. Does practice suggest that a variety of bodies can make this decision? If so, what potential implications could this entail? For example, could this lead to variable approaches being taken to secondary RtoP's activation? Can the existing mandates of relevant actors be fully reconciled with their role in determining secondary RtoP's activation?

The field of minority protection is drawn upon at appropriate junctures throughout the chapter in order to assess whether secondary RtoP's activation overlaps with, or adds value

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of International Lawmaking' (2010) 35 Yale Journal of Int'l L. 469; N Wheeler, 'A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit' (Paper presented at 'The UN at Sixty: Celebration or Wake?' conference, University of Toronto, 6-7 October 2005) 8  
 <<http://cadair.aber.ac.uk/dspace/bitstream/2160/1971/1/a%20victory%20for%20common%20humanity%20Wheeler.pdf>> accessed 12 May 2012; S Rosenberg and E Strauss, "A Common Approach to the Application of the Responsibility to Protect" in D Fiott et al, *Operationalising the Responsibility to Protect: A Contribution to the Third Pillar Approach* (The Madariaga College of Europe Foundation, Brussels 2012) 72.

<sup>1068</sup> Outcome Document (n 1058), paras 138 and 139.

<sup>1069</sup> Outcome Document, *ibid*, para 139.

<sup>1070</sup> Outcome Document, *ibid*.

to, the international community's role in a minority protection context. Does the activation of non-peaceful responsive measures overcome some of the drawbacks of the use of armed force for human protection purposes, including minorities, in earlier practice? For example, does secondary RtoP help to clarify what harm should be sustained by a population in order to warrant armed force? Does secondary RtoP provide a new way of balancing the need to take international action to protect populations with State concerns over the way in which such action could undermine their sovereignty, territorial integrity and non-interference in their internal affairs? Are there any safeguards in place in order to diminish the prospect of States justifying inaction on the basis that the legal elements of mass atrocity crimes are not conclusively established in a particular case (i.e. the Rwanda problem<sup>1071</sup>)?

## 1 The Substantive Aspects of Secondary RtoP's Activation in Practice

Notwithstanding the Outcome Document provision for assistance to be provided to States 'before crises and conflicts break out',<sup>1072</sup> practice suggests that a population must sustain some harm before secondary RtoP is activated, even in respect of its assistance component. To this effect, the activation of secondary RtoP's assistance, peaceful and non-peaceful components in practice to date appears to have been based upon the *legal elements* of RtoP crimes *arising* within a State.<sup>1073</sup> In terms of assistance measures, reference can be made to the case studies of Kenya, Côte d'Ivoire and Kyrgyzstan. In these cases assistance was (i) provided (diplomatic in Kenya<sup>1074</sup> / military in Côte d'Ivoire<sup>1075</sup>) or (ii) recommended for

<sup>1071</sup> The debate over whether the legal elements of the crime of genocide were established in Rwanda was discussed in chapter two. On this debate, see R Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Arrow Books, London 2004) 343 and 374. See further, L van den Herik, "The Schism between the Legal and the Social Concept of Genocide in Light of the Responsibility to Protect" in R Henham and P Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate Publishing, Aldershot 2007) 76.

<sup>1072</sup> Outcome Document (n 1058), para 139.

<sup>1073</sup> See for e.g. Statement of the UN Special Adviser to the UN Secretary-General on the Prevention of Genocide, 'The Situation in Kenya' (28 January 2009) cited in UN Department of Public Information, 'The United Nations and Kenya: Briefing Note' (7 February 2008) 4 <<http://www.responsibilitytoprotect.org/files/Feb%202008%20Kenya%20UN%20briefing%20note.pdf>> accessed 12 November 2012 (Statement of the SAPG in UN DPI, 'The United Nations and Kenya: Briefing Note'); UNSC Res 1962 (2010) UN Doc S/RES/1962, para 9 (UNSC Res 1962); UN Press Release, 'UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan' (15 June 2010) <<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 27 July 2012 (UN Press Release, 'UN Special Advisers of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan'); UNHRC Res S-15/1, 'Situation of Human Rights in the Libyan Arab Jamahiriya' (25 February 2011) UN Doc A/UNHRC/RES/ S-15/1, para 2 (UNHRC Res S-15/1); UNHRC Res S-16/1, 'The Current Human Rights Situation in the Syrian Arab Republic in the Context of Recent Events' (29 April 2011) UN Doc A/UNHRC/RES/S-16/1, para 1 (UNHRC Res S-16/1); UNSC Res 1970 (2011) UN Doc S/RES/1970, preambular para 6 (UNSC Res 1970); UNSC Res 1975 (2011) UN Doc S/RES/1975, preambular para 13 (UNSC Res 1975); UNSC Res 1973 (2011) UN Doc S/RES/1973, preambular para 7 (UNSC Res 1973).

<sup>1074</sup> Statement of the SAPG in UN DPI, 'The United Nations and Kenya: Briefing Note', *ibid*.

provision (Kyrgyzstan<sup>1076</sup>). The activation of assistance measures in these cases seems to have exceeded requiring that the recipient State has *requested* assistance or *consented* to its provision. Rather, reference was made to the possibility that the *legal elements* of RtoP crimes were arising within the recipient State *before* assistance was provided or recommended.<sup>1077</sup> For example, the statement of the UN Special Advisers on the Prevention of Genocide and RtoP on the situation in Kyrgyzstan called for the international community to provide assistance under secondary RtoP, because '[t]he pattern and scale of the violence [...] could amount to ethnic cleansing'.<sup>1078</sup>

In terms of the activation of *peaceful responsive measures*, the UN Human Rights Council's (UNHRC) deployment of fact-finding missions to Libya<sup>1079</sup> and Syria<sup>1080</sup> are useful illustrations. In Libya, the UNHRC recalled the Libyan authorities' primary RtoP duty<sup>1081</sup> and noted that some of the human rights violations being committed 'may also amount to crimes against humanity'.<sup>1082</sup> Similarly, when requesting that a mission be dispatched to Syria, the UNHRC recalled the authorities' primary RtoP duty,<sup>1083</sup> calling for the Mission to determine the 'facts and circumstances'<sup>1084</sup> of both the 'violations *and crimes* committed'.<sup>1085</sup>

In relation to the activation of secondary RtoP's non-peaceful responsive measures, such as collective sanctions and the use of armed force, it is notable that relevant actors have *expressly* referred to the *specific* RtoP crimes which may be being committed in a State. For example, when authorising the use of collective sanctions in Libya<sup>1086</sup> and Côte d'Ivoire,<sup>1087</sup> the UNSC explicitly stated that the situations 'could',<sup>1088</sup> and 'may',<sup>1089</sup> entail crimes against

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<sup>1075</sup> UNSC Res 1962 (n 1073), para 3 [renewing the mandate of the UNOCI mission].

<sup>1076</sup> UN Press Release, 'UN Special Advisors of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan' (n 1073).

<sup>1077</sup> Statement of the SAPG in UN DPI, 'The United Nations and Kenya: Briefing Note' (n 1073), 4 ['political and community leaders may be held accountable for *violations of international law* committed at their instigation and urged them to meet their responsibility to protect the *civilian population* and prevent violence', emphasis added]. On the Côte d'Ivoire see UNSC Res 1962 (n 1073), para 9 [referring to 'sexual violence' and 'humanitarian law violations']. On Kyrgyzstan see UN Press Release, 'UN Special Advisors of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan', *ibid* [referring to the 'pattern and scale of the violence, which has resulted in the mass displacement of Uzbeks from South Kyrgyzstan, could amount to ethnic cleansing'].

<sup>1078</sup> UN Press Release, 'UN Special Advisors of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan', *ibid*.

<sup>1079</sup> UNHRC Res S-15/1 (n 1073).

<sup>1080</sup> UNHRC Res S-16/1 (n 1073).

<sup>1081</sup> UNHRC Res S-15/1 (n 1073), para 2.

<sup>1082</sup> UNHRC Res S-15/1, *ibid*, para 1.

<sup>1083</sup> UNHRC Res S-16/1 (n 1073), para 1.

<sup>1084</sup> UNHRC Res S-16/1, *ibid*, para 7.

<sup>1085</sup> UNHRC Res S-16/1, *ibid*.

<sup>1086</sup> UNSC Res 1970 (n 1073), paras 9-14 [authorising the application of an arms embargo], paras 15-16 (d) [authorising the application of a travel ban on those persons detailed in Annex I of the Resolution] and paras 17-21 [authorising the freezing of the assets of those persons detailed in Annex II of the Resolution].

<sup>1087</sup> UNSC Res 1975 (n 1073), para 12 (authorising the application of targeted sanctions against those persons detailed in Annex I of the Resolution).

<sup>1088</sup> UNSC Res 1975, *ibid*, preambular para 13.

<sup>1089</sup> UNSC Res 1970 (n 1073), para 6.

humanity. This was also expressly stated in UNSC Resolution 1973<sup>1090</sup> which authorised the use of armed force to protect civilians in Libya and strengthened the collective sanctions.<sup>1091</sup>

Basing secondary RtoP's activation on the emergence of the legal elements of RtoP crimes within a State raises some significant questions. Primarily, there is the question of what this approach suggests about the general nature of secondary RtoP's activating threshold. Does the threshold rest upon RtoP crimes being *perceived* to be *imminent*? Alternatively, does the threshold depend upon the existence of clear *evidence* that RtoP crimes *are being perpetrated*?

## 1.1 The General Nature of the Activating Threshold

There are two notable themes in relevant practice. First, secondary RtoP's activation has not depended upon the existence of evidence which indicates that RtoP crimes have been perpetrated *in full*. Reference has been made to the (i) actus reus of the RtoP crime(s) apprehended in a particular case (e.g. “widespread and systematic”); and/or (ii) protected persons of the RtoP crime(s) apprehended in a particular case (e.g. “civilian population”). However, there has been no explicit consideration of whether these acts have been carried out with the requisite *mens rea*. For instance, UNSC Resolution 1973 on the situation in Libya notes that the facts on the ground were such as to suggest that crimes against humanity may be being, or about to be, committed.<sup>1092</sup> Whilst reference was made to factors which go toward establishing the actus reus of crimes against humanity (e.g. ‘the widespread and systematic attacks’ occurring ‘against the civilian population’<sup>1093</sup>), there was no obvious consideration of whether these acts were accompanied by the requisite *mens rea*. Second, it appears to have been sufficient that the acts occurring in the State are such as to suggest that RtoP crimes “may” be being, or be about to be, perpetrated. This comes through in practice at the international level in, for example, the UNSC Resolutions authorising targeted sanctions in the case studies of Libya<sup>1094</sup> and Côte d’Ivoire<sup>1095</sup> and for the use of armed force in Libya.<sup>1096</sup> Each of the authorising UNSC Resolution’s noted that the acts in the respective States ‘may’<sup>1097</sup> or ‘could’<sup>1098</sup> amount to crimes against humanity.

Together, the two themes in practice suggest that relevant actors consider that secondary

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<sup>1090</sup> UNSC Res 1973 (n 1073), preambular para 7.

<sup>1091</sup> UNSC Res 1973, *ibid*, paras 4-5 [authorising the “use of all necessary means” to protect civilians], paras 6-12 [establishing a No Fly Zone], paras 13-16 [regarding the enforcement of the arms embargo], paras 17-18 [regarding the ban on flights] and paras 19-21 [regarding the freezing of assets of those detailed in Annex II].

<sup>1092</sup> UNSC Res 1973, *ibid*, preambular para 7.

<sup>1093</sup> UNSC Res 1973, *ibid*.

<sup>1094</sup> UNSC Res 1970 (n 1073), paras 9-25.

<sup>1095</sup> UNSC Res 1975 (n 1073), para 12.

<sup>1096</sup> UNSC Res 1973 (n 1073), paras 4-12.

<sup>1097</sup> UNSC Res 1970 (n 1073), preambular para 6 and UNSC Res 1973, *ibid*, preambular para 7.

<sup>1098</sup> UNSC Res 1975 (n 1073), preambular para 13.

RtoP's activating threshold can generally be explained as one of *imminence*. This is significant because an imminence based threshold enables secondary RtoP's respective components to be discharged for *preventive* purposes. As noted in chapter one, the Outcome Document does not *explicitly* state that each of secondary RtoP's components entails a preventive dimension. Instead, a preventive dimension is merely implied through the Outcome Document's provision for secondary RtoP to be discharged to protect populations 'from'<sup>1099</sup> (not 'in the event of'<sup>1100</sup>) RtoP crimes. This writer would argue that the overlap between an imminence threshold and a prevention component is valuable because it enables the spectrum of secondary RtoP measures to be discharged prior to the *actual perpetration* of RtoP crimes. This strengthens, at least in principle, the international community's role in protecting populations from RtoP crimes. To this effect, it will be recalled that an effective international response to the situation in Rwanda was partly impeded by debates over whether the legal elements of genocide had actually arisen, specifically whether "genocide" was actually being committed in a legal sense.<sup>1101</sup> An imminence threshold provides for the international community to take protective action when it is considered that an RtoP crime "may"<sup>1102</sup> be occurring, however. This could help to diminish the prospect that legalistic debates regarding the nature of the harm sustained by a population will undermine the international community's *capacity* to discharge secondary RtoP.

This relates to Oman's<sup>1103</sup> critique of the 2001 ICISS Report for failing to outline any criteria to guide decision making over when to apply measures to prevent the perpetration of RtoP crimes, thereby creating ambiguity over when the "responsibility to prevent" becomes activated.<sup>1104</sup> Despite writing in 2009, Oman does not expressly consider whether this issue was in any way resolved by the Outcome Document's 2005 adoption. The present author considers that an imminence threshold could help to overcome this omission. As discussed above, the application of assistance measures have also required that RtoP crimes appear *imminent*. Accordingly, practice following the Outcome Document's adoption appears to have clarified secondary RtoP's activation more effectively than earlier Reports, specifically

<sup>1099</sup> Outcome Document (n 1058), paras 138-139.

<sup>1100</sup> The High-Level Panel stated that they 'endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, *in the event of* genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent', emphasis added. Report of the High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2004) UN Doc A/59/562, 66. (HLP Report).

<sup>1101</sup> See e.g. Dalliare (n 1071), 343 and 373 and L van den Herik (n 1071), 76 [noting the reluctance of some States to use, as she writes, 'the G-word' in relation to Rwanda].

<sup>1102</sup> UNSC Res 1970 (n 1073), preambular para 6; UNSC Res 1973 (n 1073), preambular para 7 and UNSC Res 1975 (n 1073), preambular para 13.

<sup>1103</sup> N Oman, 'The 'Responsibility to Prevent': A Remit for Intervention?' (2009) 22 Can. J. L. & Jurisprudence 355.

<sup>1104</sup> Oman argues: 'But while the authors rightly identify preventive responsibility as the foundational aspect of the responsibility to protect, they fail to define the parameters of acceptable pre-crisis intervention in similar detail'. Oman, *ibid*, 365.

by providing that the decision to take action in advance of the actual perpetration of RtoP crimes should be based on an apprehension that, if assistance is not given, RtoP crimes will be perpetrated in the near future.

Notwithstanding this, basing secondary RtoP's activation on the fact that RtoP crimes 'may'<sup>1105</sup> be perpetrated imminently can require decision makers to conduct a 'forward-looking assessment'<sup>1106</sup> of the situation which, Rosenberg correctly argues, 'is by its nature a very different enquiry than the assessment of the evidence to determine whether a fact has been proven about a past event'<sup>1107</sup> (i.e. a 'backward-looking assessment'<sup>1108</sup> of a particular situation). To Rosenberg, the need to consider 'the likelihood of prospective conduct'<sup>1109</sup> within a State (i.e. the imminence of RtoP crimes) can lead relevant actors to determine secondary RtoP's activation in specific cases based upon their own 'gut reactions or feelings'.<sup>1110</sup> In Rosenberg's view, it is necessary to introduce a more objective formula into international decision making on secondary RtoP's activation, requiring relevant actors to apply a:

'[S]tandard of reasonable suspicion [...] which is met when a reliable body of evidence indicates the occurrence of a particular incident or event. Relevant facts cannot be established solely on the basis of reports in mass or social media and must be corroborated'.<sup>1111</sup>

The main thrust of Rosenberg's argument here is that an imminence threshold can raise issues of an evidential nature because it requires relevant actors to determine that RtoP crimes are *likely* to arise, thereby making decision making on secondary RtoP's activation somewhat *subjective*. Rosenberg appears to be concerned that, absent a 'standard of reasonable suspicion',<sup>1112</sup> decisions regarding secondary RtoP's activation could be inappropriately made because relevant actors have either underestimated or overestimated the (i) *level of harm* sustained by a population; and (ii) *likelihood* that RtoP crimes will be perpetrated in each situation. This argument merits reflection.

On the one hand, the present author would argue that we should avoid potentially underrating (i) the existing techniques which are used by relevant bodies to establish the

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<sup>1105</sup> See for example, UNSC Res 1973 (n 1073), preambular para 7.

<sup>1106</sup> Rosenberg and Strauss (n 1067), 58.

<sup>1107</sup> Rosenberg and Strauss, *ibid*.

<sup>1108</sup> Rosenberg and Strauss, *ibid*.

<sup>1109</sup> Rosenberg and Strauss, *ibid*.

<sup>1110</sup> Rosenberg and Strauss, *ibid*, 56. Scheffer also makes this point, arguing that applying secondary RtoP in response to the 'threat' of RtoP crimes can require the international community to 'make political decisions about whether and how to take action while gambling on the nature of the crime threatening the civilian population and how, if left unchallenged, that crime may unfold on the ground, including its likely severity'. D Scheffer, "Atrocity Crimes Framing the Responsibility to Protect" in R Cooper and J Kohler (eds), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (Palgrave Macmillan, New York 2009) 78-98, 80 and 93.

<sup>1111</sup> Rosenberg and Strauss, *ibid*, 71, ellipsis added.

<sup>1112</sup> Rosenberg and Strauss, *ibid*.

nature, gravity and scale of the harm sustained by a population; and (ii) the utility of an imminence threshold for guiding decision making on secondary RtoP's activation. With regard to the former, it is notable that the existing mechanisms to which RtoP relates already employ a variety of techniques to guard against the risk of unreliable evidence of human rights violations. For example, the UNHRC and UNSC can authorise human rights personnel to investigate the situation inside the State. If national authorities do not permit the personnel entry into the State's territory, the personnel will, for example, conduct interviews with refugees fleeing the territory (as in Darfur<sup>1113</sup> and Syria<sup>1114</sup>). Through cross-referring the testimony given, a basic picture of the human rights situation in the territory of the State can be developed and reported on.

With regard to the latter, it is noteworthy that the concept of "imminence" is not unique to the RtoP framework but, rather, that which is used more widely in international law and relations. For example, the 2004 High Level Panel Report<sup>1115</sup> clearly demarcates "imminence" as a criterion for guiding decisions on the legitimacy and necessity of using armed force for self-defence purposes or, alternatively, as part of an enforcement action under Chapter VII.<sup>1116</sup> Furthermore, it is clear in this Report that "imminence" is generally accepted as a workable and relatively controlled concept which generally requires consideration of the issue of *time*. For example, the Report highlights that if the threat to a State from an "armed attack" is not in the 'distant future'<sup>1117</sup> then it may be considered to be "imminent".<sup>1118</sup> Arguably, the influence of *time* on decisions of "imminence" in a secondary RtoP context comes through in relevant practice, not least the UNSC's authorisation of armed force in Libya.<sup>1119</sup> Resolution 1973 explicitly refers to the need to protect populations in Benghazi<sup>1120</sup> which, at the time of the UNSC's meeting on this Resolution,<sup>1121</sup> was where Gaddafi threatened to "cleanse" the population.<sup>1122</sup> Thus, an imminence concept seems to essentially require decision makers to evaluate whether RtoP crimes are likely to be

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<sup>1113</sup> On the methodology of the High-Level Mission and the Sudanese government's lack of cooperation with the mission, see UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur' (9 March 2007) UN Doc A/UNHRC/4/80, 7-9. (UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur').

<sup>1114</sup> On the methodology of the United Nations High Commissioner for Human Rights and the Syrian government's lack of cooperation with the High Commissioner, see UNHRC, 'Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic' (15 September 2011) UN Doc A/UNHRC/18/53, 3-5.

<sup>1115</sup> HLP Report (n 1100).

<sup>1116</sup> HLP Report, *ibid*, 63 [on the invocation of Article 51 of the UN Charter regarding the right to self-defence] and 64 [regarding Chapter VII authorised armed force].

<sup>1117</sup> HLP Report, *ibid*, 64.

<sup>1118</sup> HLP Report, *ibid*.

<sup>1119</sup> UNSC Res 1973 (n 1073), para 4.

<sup>1120</sup> UNSC Res 1973, *ibid*.

<sup>1121</sup> UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498.

<sup>1122</sup> 'No Let-Up in Gaddafi Offensive' (Al Jazeera, 17 March 2011)

<<http://www.aljazeera.com/news/africa/2011/03/2011317645549498.html>> accessed 16 August 2012.

perpetrated against a population from RtoP crimes in the *immediate or near future*.<sup>1123</sup>

Nevertheless, some challenges to the credibility and objectivity of decision making on secondary RtoP's activation are likely to arise in practice, irrespective of the specific approaches taken by relevant actors to "evidence" regarding the imminence of RtoP crimes. The UNHRC debate on the situation in Libya<sup>1124</sup> is one illustration. Addressing the UNHRC, the UN High Commissioner for Human Rights<sup>1125</sup> (i) asserted that the Libyan authorities were perpetrating human rights violations and that these could amount to crimes against humanity;<sup>1126</sup> and (ii) recalled that the Outcome Document provides for the application of secondary RtoP measures when such crimes emerge.<sup>1127</sup> To support this standpoint, reference was made to reports made to the Office of the High Commissioner for Human Rights regarding human rights violations inside Libya<sup>1128</sup> and that these allegations were supported by corroborating testimony from 'witnesses in and out of Libya',<sup>1129</sup> including doctors who were treating the wounded.<sup>1130</sup> Nevertheless, some States claimed that secondary RtoP's activation was being determined on the basis of *unreliable evidence* and that calls for its application were *politically motivated*.<sup>1131</sup> For example, Cuba<sup>1132</sup> argued that media reports on the situation were contradictory and that Western States were exploiting this in order to 'incite violence, military aggression and intervention'<sup>1133</sup> against the Libyan regime. Nicaragua<sup>1134</sup> suggested that Western media were perhaps wrongly reporting on the situation so as to legitimise intervention in the State and enable them to gain control of Libya's natural resources. Arguably, this suggests that some States may claim that there is a lack of *credible* evidence that RtoP crimes are imminent in a particular case, irrespective of what approaches are taken to relevant evidence, because they are apprehensive over the way in which secondary RtoP's activation could impact upon their own policy interests. For Cuba<sup>1135</sup> and Nicaragua,<sup>1136</sup> policy interests in Libya included the possibility that an intervention led by

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<sup>1123</sup> The specific factors which can be taken into account in order to establish the prospect of the perpetration of RtoP crimes are discussed in the section below.

<sup>1124</sup> UN Press Release, 'UN Human Rights Council Debates Situation of Human Rights in Syrian Arab Republic' (22 August 2011)

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11324&LangID=E>> accessed 14 November 2011. (UN Press Release, 'UN Human Rights Council Debates Situation of Human Rights in Syrian Arab Republic').

<sup>1125</sup> UNHRC, 'Situation of Human Rights in the Libyan Arab Jamahiriya: Statement of Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights' (25 February 2011)

<[http://www2.ohchr.org/english/bodies/hrcouncil/.../A.HRC.17.44\\_AUV.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/.../A.HRC.17.44_AUV.pdf)> accessed 14 November 2011.

<sup>1126</sup> 'Statement of Ms. Navanethem Pillay', *ibid*, 4.

<sup>1127</sup> 'Statement of Ms. Navanethem Pillay', *ibid*, 2.

<sup>1128</sup> 'Statement of Ms. Navanethem Pillay', *ibid*, 4.

<sup>1129</sup> 'Statement of Ms. Navanethem Pillay', *ibid*.

<sup>1130</sup> 'Statement of Ms. Navanethem Pillay', *ibid*.

<sup>1131</sup> Statements of the Representatives of *Cuba* and *Nicaragua* to the UNHRC in UN Press Release, 'UNHRC Debates Situation of Human Rights in Syrian Arab Republic' (n 1124).

<sup>1132</sup> Statement of the Representative of *Cuba*, *ibid*.

<sup>1133</sup> Statement of the Representative of *Cuba*, *ibid*.

<sup>1134</sup> Statement of the Representative of *Nicaragua*, *ibid*.

<sup>1135</sup> Statement of the Representative of *Cuba*, *ibid*.

<sup>1136</sup> Statement of the Representative of *Nicaragua*, *ibid*.



Western States could reinvigorate neo-colonial policies and undermine the principle of non-interference in States internal affairs. This raises the possibility that secondary RtoP's activation may become *politicised* in practice. That is, States may challenge whether RtoP crimes are actually imminent in order to *avoid* secondary RtoP's activation for their own political reasons. This raises the question of whether there are any safeguards in place to avoid secondary RtoP's activation being undermined by States wider policy concerns, not least whether there are certain factors which can be taken into account in order to *objectively establish* that RtoP crimes are imminent.

### 1.2.1 Establishing Imminence

Examination of practice suggests that two factors have informed determinations of the imminence of RtoP crimes and, therefore, secondary RtoP's activation. The first factor is *the nature, gravity and scale of the particular acts* being perpetrated against the population. Particular attention has been given to the specific kind of harm sustained by the population and whether this overlaps with the legally defined nature of the mass atrocity crimes that RtoP covers. For example, whether the acts suggest that a 'widespread and systematic attack'<sup>1137</sup> against the population is imminent. Consideration has also been given to whether the gravity and scale of the acts being perpetrated meets the standard of the mass atrocity crimes covered by RtoP. For instance, reference has been made to whether the acts being committed are being carried out on a 'widespread'<sup>1138</sup> basis and, therefore, that they could suggest that crimes against humanity are imminent.

The second factor is *who* the acts have been perpetrated against. Relevant actors seem to have examined whether the harm is being perpetrated against the protected persons of the RtoP crime(s) that is considered to be imminent. For instance, reference has been made to the harm sustained by the 'civilian population'<sup>1139</sup> (i.e. crimes against humanity) or a specific

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<sup>1137</sup> See for example UNSC Res 1973 (n 1073), preambular para 7; UNSC Res 1970 (n 1073), preambular para 6; UN Press Release, 'Statement by the Special Advisers of the United Nations Secretary-General, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria' (2 June 2011) <<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 11 August 2012 ('Statement by the Special Advisers of the United Nations Secretary-General, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria', 2 June 2011) and Statement of the Representative of *Germany* to the UNSC, UNSC Verbatim Record (17 March 2011) UN Doc. S/PV.6498.

<sup>1138</sup> See for example, UNSC Res 1973, *ibid*; UNSC Res 1970, *ibid*; Statement of the UN Special Advisers, *ibid* and Statement of the Representative of *Germany* to the UNSC, *ibid*.

<sup>1139</sup> For e.g. UNSC Res 1975 (n 1073), preambular para 13 and para 6; Statements of the Representatives of *Gabon*, *Colombia* and *Côte d'Ivoire* to the UNSC, UNSC Verbatim Record (30 March 2011) UN Doc. S/PV.6508; UNSC Res 1962 (n 1073), para 5; Statement of the SAPG in UN DPI, 'The United Nations and Kenya: Briefing Note' (n 1073), 4; UNHRC Res S-15/1 (n 1073), para 4; UNSC Res 1973 (n 1073), preambular paras 7 and 14; Statements of the Representatives of the *Russian Federation*, *France*, *Germany* and *Brazil* to the UNSC, UNSC Verbatim Record (26 February 2011) UN Doc S/PV.6491; Statements of the Representatives of *France*, *Lebanon*, *India*, *Colombia* and the *Russian Federation* to the UNSC, UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498; UNSC Res 1970, *ibid*, preambular paras 2 and 6; European Parliament Res, 'The Situation in Darfur' (2006) EP Doc P6\_TA(2006)0387, paras D and 10 (EP Res, 'The Situation in Darfur') and

ethnic group like the Kyrgyzstan Uzbek minority<sup>1140</sup> (i.e. ethnic cleansing). This trend in practice may have a wider significance. The focus on *protecting large groups of individuals* (e.g. “civilian population”) from RtoP crimes, as opposed to an individual, may explain why certain terms were used in the Outcome Document. Each draft of the Outcome Document proposed providing for the protection of the ‘civilian population’<sup>1141</sup> or ‘populations’,<sup>1142</sup> not “individuals”. This raises the possibility that the Outcome Document’s references to ‘populations’<sup>1143</sup> is significant not only in terms of the beneficiary concept,<sup>1144</sup> but also regarding the *gravity of harm* that States consider is necessary before human rights violations can activate secondary RtoP. Here, it should be recalled that human rights law provides that individuals can be the victims of torture. Accordingly, the Outcome Document’s use of ‘populations’<sup>1145</sup> suggests that States consider that an “act of torture” against an individual would be insufficient to activate secondary RtoP. Instead, for human rights violations to activate secondary RtoP, they should be of the scale to require the protection of populations within the State more generally.

Syria is one illustration of secondary RtoP’s activation requiring that human rights violations be of the nature, gravity and scale to suggest that RtoP crimes are imminent. Originally international actors condemned the situation from the viewpoint of violations of international human rights law.<sup>1146</sup> It was not until the violence escalated that some relevant actors began to invoke the language of RtoP to condemn the situation.<sup>1147</sup> A similar approach

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‘Statement by the Special Advisers of the United Nations Secretary-General, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria’, 2 June 2011 (n 1137).

<sup>1140</sup> UN Press Release, ‘UN Special Advisers of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan’ (n 1073).

<sup>1141</sup> UNGA President, ‘Revised Draft Outcome Document of the High-Level Plenary Meeting of the UNGA of September 2005’ (3 June 2005), para 72 and UNGA President, ‘Revised Draft Outcome Document of the High-Level Plenary Meeting of the UNGA of September 2005’ (22 July 2005) reprinted in World Federalist Movement, ‘State-by-State Positions on the Responsibility to Protect’ (11 August 2005), 11-12 <<http://www.responsibilitytoprotect.org/index.php/document-archive/civil-society?view=fjrelated&id=2411>> accessed 11 August 2012.

<sup>1142</sup> UNGA President, ‘Revised Draft Outcome Document of the High-Level Plenary Meeting of the UNGA of September 2005’ (5 August 2005) UN Doc A/59/HLP/CRP.1/Rev.2, 28.

<sup>1143</sup> Outcome Document (n 1058), paras 138 and 139.

<sup>1144</sup> Chapter two discussed the significance and implications of a “populations” beneficiary concept at length.

<sup>1145</sup> Outcome Document (n 1058), paras 138 and 139.

<sup>1146</sup> For e.g. Spokesperson for the UNSG, ‘Secretary-General Condemns Syria Killings, Calls for an End to Violence’ (25 April 2011) UN Doc SG/SM/13521; UN High Commissioner for Human Rights, ‘Pillay Denounces Escalation of Government Crackdown in Syria, Calls for Immediate End to Killings’ (25 April 2011) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10958&LangID=E>> accessed 14 November 2011; Council Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria (9 May 2011) OJL 121 10 May 2011 and Council Regulation (EU) No 504/2011 implementing Regulation (EU) 442/2011 concerning restrictive measures in view of the situation in Syria (23 May 2011) OJL 136 24 May 2011.

<sup>1147</sup> For e.g. ‘Statement by the Special Advisers of the United Nations Secretary-General, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria’, 2 June 2011 (n 1137); UN Press Release, ‘Statement by Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria’ (21 July 2011) <<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 14 November 2011; European Union, ‘Statement of the High Representative on the extension of restrictive measures against Syrian individuals responsible for and associated with repression’ (1 August 2011) EP Doc A 306/11 and European Parliament Resolution, ‘Situation in Syria, Bahrain and Yemen in the Context of the Situation in the Arab World and North

has been adopted at the regional (European) level. Whilst the European Parliament [EP] adopted a Resolution denouncing the gross violations of human rights in Bahrain, Yemen and Syria,<sup>1148</sup> RtoP was only referred to with respect to Syria.<sup>1149</sup> This suggests that a distinction has been made in practice between (i) all human rights violations which can engage the *interest* of the international community *generally*; and (ii) human rights violations which can, due to their nature, gravity and scale, suggest that RtoP crimes may be imminent and, therefore, can activate *international action* through the spectrum of measures covered by secondary RtoP. These factors can be determined by reason of the (i) general nature of the violations (e.g. right against torture and crimes against humanity<sup>1150</sup>); (ii) the gravity of the violations (e.g. “widespread and systematic attack”,<sup>1151</sup> not isolated instances of violations against individuals); *and* (iii) the scale of the violations (e.g. against “populations”, not violations against “individuals”). Arguably, secondary RtoP therefore codifies a *tipping point* for when the international community should, in principle, discharge assistance, peaceful or non-peaceful responsive measures to protect populations from RtoP crimes.

A “tipping point” helps to create an objective standard regarding the gravity, nature and scale of the harm that a population should sustain to warrant secondary RtoP’s activation. This is significant at a policy level because it helps to guard against States invoking secondary RtoP to justify the use of unauthorised armed force for *debatable* human protection purposes. This helps to further distinguish secondary RtoP from the wider concept of humanitarian intervention. One difficulty with humanitarian intervention is that it does not clearly demarcate the nature, gravity and scale of the human rights violations which can legitimately activate the use of armed force. This leaves ambiguity over (i) *when* humanitarian intervention is legitimate;<sup>1152</sup> (ii) the range of human rights violations that it

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Africa’ (7 July 2011) EP Doc P7\_TA(2011)0333, para 10. (EP Res, Situation in Syria, Bahrain and Yemen in the Context of the Situation in the Arab World and North Africa’).

<sup>1148</sup> EP Res, Situation in Syria, Bahrain and Yemen in the Context of the Situation in the Arab World and North Africa’, *ibid* paras (i) J [on human rights violations in Yemen]; (ii) O, P, R, 1 and 21, 23 [on human rights violations in Bahrain] and (iii) 4-8 [on human rights violations in Syria].

<sup>1149</sup> EP Res, Situation in Syria, Bahrain and Yemen in the Context of the Situation in the Arab World and North Africa’, *ibid*, para 10.

<sup>1150</sup> The overlap between certain human rights violations and the legal elements of RtoP crimes was noted in the preceding chapter. See respectively, an individual’s right against torture in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 and torture as an act which can constitute a crime against humanity in, for example, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 art 7 (f) (Rome Statute). See also, the way in which condemnations of the violations of the right against torture were accompanied by the express reiteration of the Syrian authorities primary RtoP duty in EP Res, ‘The Situation in Syria, Bahrain and Yemen in the Context of the Situation in the Arab World and North Africa’, *ibid*, paras D and 10 and, further, paras C, D and 4.

<sup>1151</sup> Rome Statute (n 1150), art 7 (1).

<sup>1152</sup> Or as Gareth Evans has put the question - ‘[w]hen exactly did individual sovereignty claims take primacy over State sovereignty? How does one identify the point at which the former should override the latter?’ G Evans, ‘From Humanitarian Intervention to the Responsibility to Protect’ (2006-2007) 24 Wis. Int’l L.J. 703, 707.

covers; and (iii) the specific gravity that the violations should have.<sup>1153</sup> In short, secondary RtoP's activation seems to add value to that of humanitarian intervention because it more clearly clarifies the *factual threshold* which should be met in order to justifiably use armed force to protect populations. At the same time, secondary RtoP's "tipping point" makes the argument that the international community should give unconditional respect to the principle of non-intervention in internal affairs seem less legitimate.

### 1.2.2 The Scope of Decision Making on the Imminence of RtoP Crimes

The factors used to establish that RtoP crimes are imminent in practice to date relate to arguments in present literature regarding the *scope* of decision making on secondary RtoP's activation. First, the factors used to establish that RtoP crimes may be imminently perpetrated add weight to Strauss's<sup>1154</sup> view on why the criteria of "manifest failure"<sup>1155</sup> and "inadequacy of peaceful means"<sup>1156</sup> feature in the final text of the Outcome Document. Strauss argues that the aforementioned criteria are used in the final text because they require relevant actors to base decisions on secondary RtoP's activation on more objective factors than the 'unable or unwilling'<sup>1157</sup> threshold used in the ICISS Report and earlier drafts of the Outcome Document.<sup>1158</sup> To the present author, the merit of this argument lies in the fact that establishing that the legally defined crimes that RtoP covers are imminent is less subjective and open to interpretation than trying to determine whether a State is *prepared* (i.e. 'willing'<sup>1159</sup>) to protect its population.

The factors on which to establish the imminence of RtoP crimes challenge some of the arguments in the present literature regarding the interplay between the legal elements of RtoP crimes and secondary RtoP's activation.<sup>1160</sup> For example, Wong<sup>1161</sup> argues that

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<sup>1153</sup> On the debate surrounding Humanitarian Intervention see for e.g. C Gray, *International Law and the Use of Force* (3rd edn OUP, Oxford 2008) 31-52.

<sup>1154</sup> E Strauss, "A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect" in A J Bellamy, S E Davies and L Glanville (eds), *The Responsibility to Protect and International Law* (Martinus Nijhoff, Leiden 2011) 33.

<sup>1155</sup> Outcome Document (n 1058), para 139.

<sup>1156</sup> Outcome Document, *ibid*.

<sup>1157</sup> Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, Ottawa 2001) 17. (ICISS Report).

<sup>1158</sup> UNGA President, 'Revised Draft Outcome Document of the High-Level Plenary Meeting of the UNGA of September 2005' (22 July 2005) UN Doc A/59/HPLM/CRP.1/Rev.1, para. 113. This change is also discussed briefly by Rosenberg and Strauss. See Rosenberg and Strauss (n 1067), 60.

<sup>1159</sup> ICISS Report (n 1157).

<sup>1160</sup> See especially, J Wong, 'Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism' (2009) 84 (2) *Tulane Law Review* 219; Rosenberg and Strauss (n 1067), 55-72; J Kleffner, "The Scope of the Crimes Triggering the Responsibility to Protect" in J Hoffman and A Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice* (Amsterdam University Press, Amsterdam 2012) 85-93 and Scheffer (n 1110), 78-98.

<sup>1161</sup> Wong, *ibid*.

deciding whether to apply secondary RtoP should be informed by the way in which the legal elements of RtoP crimes have been explained ‘in prevailing international criminal jurisprudence’,<sup>1162</sup> including mens rea issues.<sup>1163</sup> This tends to contradict practice which has so far only reviewed whether the *actus reus* elements of an RtoP crime appear to have emerged, quite likely to help avoid inhibiting secondary RtoP’s activation by legalistic debates over whether the harm sustained by populations is accompanied with the *requisite criminal intent*.

Furthermore, the factors for determining imminence relate to the argument in present literature that secondary RtoP’s activation overlaps with the international criminal law “substantiality test”.<sup>1164</sup> Scheffer<sup>1165</sup> is a useful example of this line of argument. Drawing upon the way in which international criminal tribunals have outlined the requisite gravity and scale of the mass atrocity crimes to which RtoP relates, Scheffer argues that secondary RtoP’s ‘legitimate’<sup>1166</sup> activation depends upon each case meeting ‘the substantiality test developed by the international and hybrid criminal tribunals’.<sup>1167</sup> As both require that the acts at issue be of certain *gravity*,<sup>1168</sup> the present author considers that connecting secondary RtoP’s activation to the “substantiality test” is useful, even if only to distinguish the subset of acts which it can be activated by from those human rights violations which, due to their nature, gravity and scale, fall outside secondary RtoP’s reach. Nevertheless, it is also necessary to avoid overly conflating the substance of secondary RtoP’s activating threshold and the “substantiality test”. Although there may be some congruence in the factors taken into account under both (e.g. the nature and scale of the acts committed), practice suggests that there are also differences. One variation is that questions of mens rea have not been explicitly examined in relation to secondary RtoP, whereas they have sometimes been referred to in relation to the “substantiality test”.<sup>1169</sup>

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<sup>1162</sup> Wong, *ibid*, 263.

<sup>1163</sup> Wong, *ibid*, 252-256.

<sup>1164</sup> See especially, Rosenberg and Strauss (n 1067), 58-61 [reviewing the merits of stakeholders tendency to conflate the threshold of harm necessary for the activation of secondary RtoP with that used to determine whether a case should be prosecuted by the ICC] and 61-62 [reviewing the extent to which domestic criminal legal standards of evidence could clarify the threshold for secondary RtoP’s activation]; Scheffer (n 1110), 83-84. For a discussion of the gravity/substantiality of mass atrocity crimes that is necessary for a case to be prosecuted by the ICC, see generally R Rastan, ‘What is a Case for the Purpose of the Rome Statute?’ (2008) 19 *Criminal Law Forum* 435; W A Schabas, ‘State Policy as an Element of International Crimes’ (2008) 98 (3) *Journal of Criminal Law and Criminology* 953, 979-981; M El Zeidy, ‘The Gravity Threshold under the Statute of the International Criminal Court’ (2008) 19 *Criminal Law Forum* 35 and W A Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2008) 6 *J Int Crim Justice* 731, 736-748.

<sup>1165</sup> Scheffer, *ibid*, 78-98.

<sup>1166</sup> Scheffer, *ibid*, 83.

<sup>1167</sup> Scheffer, *ibid*, 82.

<sup>1168</sup> As Scheffer explains, ‘[t]he crime must be of significant magnitude, meaning that its commission is widespread or systematic or occurs as part of a large-scale commission of such crimes’. Scheffer, *ibid*.

<sup>1169</sup> For e.g. in what Schabas describes as ‘the most elaborate discussion to date of the issue of gravity in documents emanating from the Office of the Prosecutor’, the ICC Prosecutor referred to the ‘*intentional* and large-scale sexual violence and abductions’ in Northern Uganda, DRC and Darfur. The statement related to why the ICC would investigate the aforementioned situations and not proceed with investigation of the actions of British troops during the intervention in Iraq. ‘Statement on communications concerning Iraq’, The Hague, 9

Furthermore, secondary RtoP's activation may actually require a *higher* threshold of "substantiality" than the Rome Statute. War crimes are a useful illustration. The recruitment and conscription of child soldiers is sufficiently grave to fall within the jurisdiction of the ICC.<sup>1170</sup> However, it is questionable as to whether this war crime would, in itself, be deemed to be so egregious to activate secondary RtoP. The scope of the crimes which activate secondary RtoP was not a controversial issue among the majority of States during drafting of the Outcome Document. However, the US argued that that the reference to "war crimes" be replaced with a reference to 'other large-scale atrocities'<sup>1171</sup> in order to clarify that secondary RtoP cannot be activated by 'all war crimes, but only those that are of sufficient scale to warrant such international attention'.<sup>1172</sup> To the US, this proposal was wholly 'in keeping with the approach in the Geneva Conventions' which 'distinguish between 'grave breaches' of the Convention, and other violations.'<sup>1173</sup> Accordingly, the US seemed to consider that the war crimes which can activate secondary RtoP should be of the gravity to meet the laws of war 'grave breaches'<sup>1174</sup> threshold. In subsequent practice, the (now former) UN Special Adviser on RtoP<sup>1175</sup> has acknowledged that it may be necessary to discuss curtailing the scope of RtoP in order to increase the level of harm which can activate secondary RtoP.<sup>1176</sup> These expressions of concern raise the significant question of whether *all* of secondary RtoP's components can be activated in the same way or, instead, on the basis of a *sliding scale*.

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February 2006, 8-9 reprinted in Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (n 1164), 740.

<sup>1170</sup> Rome Statute (n 1150) art 8 (2) (b) (xxvi) and (e) (vii).

<sup>1171</sup> Letter of the US Ambassador John Bolton to the UNGA President (30 August 2005)

<[http://www.reformtheun.org/index.php?option=com\\_docman&task=cat\\_view&gid=15&limit=15&limitstart=0&order=date&dir=ASC&category=9&Itemid=240](http://www.reformtheun.org/index.php?option=com_docman&task=cat_view&gid=15&limit=15&limitstart=0&order=date&dir=ASC&category=9&Itemid=240)> accessed 14 May 2012. (Letter of the US Ambassador John Bolton to the UNGA President).

<sup>1172</sup> Letter of the US Ambassador John Bolton to the UNGA President, *ibid*. See also, Statement of the Acting Representative of the United States to the UNGA, 'US Proposals for UN Reform' (22 June 2005)

<[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 14 May 2012 [again recommending that the reference to 'war crimes' be replaced with a reference to 'other large-scale atrocities']. (Statement of the Acting Representative of the United States to the UNGA, 'US Proposals for UN Reform').

<sup>1173</sup> Letter of the US Ambassador John Bolton to the UNGA President, *ibid*.

<sup>1174</sup> On the acts which would be considered as such within the Geneva Conventions and Rome Statute see Rome Statute (n 1150) art 8 (2) (a) (i) - (viii).

<sup>1175</sup> E C Luck, 'Conceptual, Institutional and Political Challenges' (Forward Looking Session at the European Science Foundation 'The Responsibility to Protect from Principle to Practice' Conference, Linköping, Sweden, 11 June 2010).

<sup>1176</sup> Rosenberg and Strauss note that relevant actors have 'expressed concern that the broad definition of war crimes included acts, which had little to do with the population suffering serious harm as described in the work of the ICISS report, such as compelling prisoners of war to serve in the forces of a hostile power or the killing or wounding of combatants who had surrendered'. Rosenberg and Strauss (n 1067), 59. For a similar argument regarding war crimes, see Kleffner (n 1160) 88-89 and D Hubert and A Blätter, 'The Responsibility to Protect as International Crimes Prevention' (2012) 4 (1) GRtoP 33, 54-60.

## 1.2 The Character of Activation: Uniform Standard or Sliding Scale?

The activation of secondary RtoP's assistance, peaceful and non-peaceful responsive components seems to have been approached on the basis of a *sliding scale*. To this effect, the activation of non-peaceful responsive measures appears to require that the situation at issue entail additional factors than that required for the activation of assistance or peaceful responsive measures. One example of this in international practice are the contrasting approaches adopted to the authorisation of armed force in Libya and the deployment of UNHRC fact-finding missions in Libya and Syria. UNSC Resolution 1973 outlined that the earlier measures applied by the UNSC (e.g. targeted sanctions) had failed to resolve the situation and protect the Libyan population.<sup>1177</sup> Furthermore, reference to the possibility that the situation may entail crimes against humanity<sup>1178</sup> was supplemented with statements regarding the Libyan authorities' direct involvement in harming the population.<sup>1179</sup> In contrast, the UNHRC Resolutions regarding the deployment of fact-finding missions to Libya<sup>1180</sup> and Syria<sup>1181</sup> did not comment on the ineffectiveness of previous measures but, instead, simply recalled the earlier steps taken to resolve the situation (e.g. international condemnation<sup>1182</sup>). Similarly, the aforementioned UNHRC Resolution on Syria requested *verification* of the commission of 'violations and crimes',<sup>1183</sup> as opposed to specifying that a particular RtoP crime may be occurring.

A similar approach has been adopted in relevant practice at the regional (European) level. Significantly, secondary RtoP's activation has been handled variably in EP country-specific Resolutions referring to RtoP.<sup>1184</sup> In Burma, the EP recalled the Outcome Document RtoP provisions and highlighted that the legal elements of RtoP crimes *appear to be emerging* in the State.<sup>1185</sup> However, when recommending the use of non-peaceful responsive measures in

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<sup>1177</sup> For e.g. the Security Council was keen to establish prior to authorising the use of force that less coercive means applied under Resolution 1970 (2011), such as wide ranging sanctions and referral to the ICC, had been ineffective. To this end, Resolution 1973 deplores non-compliance with Res 1970 (2011). UNSC Res 1973 (n 1073), preambular para 2.

<sup>1178</sup> UNSC Res 1973, *ibid*, preambular para 7.

<sup>1179</sup> See for example UNSC Res 1973, *ibid*, para 17 [deplores the Libyan authorities 'use of mercenaries'].

<sup>1180</sup> UNHRC Res S-15/1 (n 1073), para 11.

<sup>1181</sup> UNHRC Res S-16/1 (n 1073), para 7.

<sup>1182</sup> UNHRC Res S-15/1 (n 1073), paras 8-10 and UNHRC Res S-16/1, *ibid*, paras 5-6.

<sup>1183</sup> UNHRC Res S-16/1, *ibid*, para 7.

<sup>1184</sup> The Resolution's include: European Parliament Resolution, 'On the Southern Neighbourhood and Libya in particular' (10 March 2011) EP Doc P7\_TA(2011)0095 (EP Res, 'On the Southern Neighbourhood and Libya in particular'); European Parliament Resolution, 'The Situation in Zimbabwe' (18 December 2008) EP Doc RSP/2008/2695 (EP Res, 'The Situation in Zimbabwe'); EP Res, Situation in Syria, Bahrain and Yemen in the Context of the Situation in the Arab World and North Africa' (n 1147); European Parliament Resolution, 'Expulsion of NGO's from Darfur' (12 March 2009) EP Doc. P6\_TA(2009)0145 (EP Res, 'Expulsion of NGO's from Darfur') and European Parliament Resolution, 'The Tragic Situation in Burma' (22 May 2008) EP Doc. P6\_TA(2008)0231. (EP Res, 'The Tragic Situation in Burma').

<sup>1185</sup> For e.g. EP Res, 'The Tragic Situation in Burma', *ibid*, paras 3, K and 11 [recalling that 'UNGA Resolution 60/1 of 24 October 2005 on the World Summit Outcome, paragraph 139 of which endorsed the possibility of collective cohesive action against individual states where "national authorities are manifestly failing to protect their populations from genocide, war crime, ethnic cleansing and crimes against humanity"; 'whereas several

Darfur<sup>1186</sup> the EP (i) referred to the legal elements of RtoP crimes, such as the fact that ‘violence is often directed against the civilian population’;<sup>1187</sup> and (ii) expressly stated that ‘Sudan *has failed in its ‘responsibility to protect’ its own people*’.<sup>1188</sup>

Not all relevant actors consider peaceful and non-peaceful responsive measures to be subject to different activating thresholds. The UNSG’s 2009 Report suggests that both forms of responsive measures will be activated when the Outcome Document criteria of “manifest failure” and “inadequacy of peaceful means” are established.<sup>1189</sup> This is possibly because the Outcome Document appears to connect peaceful and non-peaceful responsive measures through its conjoining statement of ‘[i]n this context’.<sup>1190</sup> However, the present author considers that the approach adopted in practice is more consistent with the fact that the Outcome Document bases the application of non-peaceful measures on the ‘inadequacy’<sup>1191</sup> of peaceful means. This suggests that the activation of non-peaceful measures requires peaceful means should have been, or are likely to be, unable to protect the populations.

Furthermore, a sliding scale approach better corresponds with the different objectives of discharging secondary RtoP’s respective components, specifically that (i) assistance measures aim to help relevant actors to build the requisite *capacity* to protect their own

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governments, including those of EU Member States, have called for the principle of ‘responsibility to protect’, established by the UN to rescue the victims of genocide and crimes against humanity, to be applied in the case of Burma’ and ‘[t]akes the view that, if the Burmese authorities continue to prevent aid from reaching those in danger, they should be held accountable for crimes against humanity before the ICC’].

<sup>1186</sup> For e.g. when recommending that the Security Council ‘bring pressure to bear on the Sudanese authorities to accept the deployment of the already authorised UN Mission to Darfur, with a clear Chapter VII mandate’. EP Res, ‘The Situation in Darfur’ (n 1139), para 2.

<sup>1187</sup> EP Res, ‘The Situation in Darfur’, *ibid*, para D [noting the ‘violence often directed against the civilian population’ and stating that ‘the UN ‘Responsibility to Protect’ provides that, where ‘national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity,’ the UN Security Council can agree to a Chapter VII military force’].

<sup>1188</sup> EP Res, ‘The Situation in Darfur’, *ibid*, para E [noting that ‘Sudan has *failed in its ‘responsibility to protect’ its own people and is therefore obliged to accept a UN force in line with UN Security Council Resolution 1706; calls on the UN Security Council to bring pressure to bear on the Sudanese authorities to accept the deployment of the already authorised UN Mission to Darfur, with a clear Chapter VII mandate and enhanced capacities given to such a mission through UN Security Council Resolution 1706’, emphasis added*]. Another e.g. is EP Res, ‘Expulsion of NGO’s from Darfur’ (n 1184), paras A, G, H and F [these paragraphs respectively (i) refer to the ICC arrest warrants for the suspected commission of crimes against humanity; (ii) condemn the Sudanese government for failing to cooperate with the ICC; (iii) condemn the authorities for expelling aid agencies in response to the arrest warrants; and (iv) recall that ‘the UN’s ‘Responsibility to Protect’ doctrine provides that where national authorities *manifestly fail* to protect their populations, others have a responsibility to provide the protection needed’].

<sup>1189</sup> UNSG Report 2009, Implementing RtoP (n 1066), 22 [‘The threshold for prevention, capacity-building or rebuilding efforts under pillar two would certainly be lower than the threshold for a *response under pillar three*, namely that “national authorities are manifestly failing to protect their populations”’, *emphasis added*].

<sup>1190</sup> Outcome Document (n 1058), para 139. [‘The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and *other peaceful means*, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. *In this context, we are prepared to take collective action*, in a timely and decisive manner, *through the Security Council*, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity’, *emphasis added*].

<sup>1191</sup> Outcome Document, *ibid*.



populations;<sup>1192</sup> (ii) peaceful responsive measures are designed to ‘help’<sup>1193</sup> to protect populations; and (iii) non-peaceful responsive measures involve the international community responding to national authorities *manifest failure* to protect populations.<sup>1194</sup> These varying objectives suggest that a persuasive rationale underscores the sliding scale approach, namely that this approach enables assistance and peaceful responsive measures to be *activated* at an earlier stage than non-peaceful responsive measures.

### 1.2.1 The Significance and Value Added of a Sliding Scale Approach

A sliding scale approach is significant at a doctrinal level because it suggests that secondary RtoP’s activation occurs largely along a continuum which entails distinct “tipping points” for each respective component. Where along the continuum the three “tipping points” are located depends on whether the international community envisages providing assistance and/or applying peaceful or non-peaceful responsive measures. If relevant actors lack the capacity to protect the population and, as a result the population is deemed to be at risk of RtoP crimes, the international community can offer to provide assistance.<sup>1195</sup> Provided that the relevant actors<sup>1196</sup> consent to the provision of the assistance offered,<sup>1197</sup> the international community’s assistance commitment is activated. If consent is not provided and the population remains at risk of RtoP crimes, or the situation escalates and assistance measures would therefore be an inappropriate response,<sup>1198</sup> peaceful responsive measures are activated. Non-peaceful responsive measures are activated when (i) the threat to populations from RtoP crimes becomes more immediate;<sup>1199</sup> and/or (ii) RtoP crimes are considered to have already

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<sup>1192</sup> UNSG Report 2009, Implementing RtoP (n 1066), 15.

<sup>1193</sup> Outcome Document (n 1058), para 139.

<sup>1194</sup> UNSG Report 2009, Implementing RtoP (n 1066), 22-23.

<sup>1195</sup> For e.g. providing mediation and military assistance in Kenya and the Côte d’Ivoire and, furthermore, requesting the provision of assistance to help build the capacity to handle ethnic tensions in Kyrgyzstan. See respectively, Statement of the SAPG in UN DPI, ‘The United Nations and Kenya: Briefing Note’ (n 1073), 4; UNSC Res 1962 (n 1073), para 3 and UN Press Release, ‘UN Special Advisors of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan’ (n 1073).

<sup>1196</sup> The issue of to whom assistance should be provided is discussed at length in the next chapter.

<sup>1197</sup> On the requirement of consent for the provision of assistance see for e.g. UNSG Report 2009, Implementing RtoP (n 1066), 18; UNHRC, ‘Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance’ (30 March 2010) UN Doc A/UNHRC/14/43, 18 and International Law Commission, ‘Protection of Persons in the Event of Disasters’ (22 July 2009) UN Doc A/CN.4/SR.3019, 3.

<sup>1198</sup> Notably, the international community did not focus upon providing assistance in Syria but, instead, on the deployment of a fact-finding mission to try and verify the harm to the population which had already been perpetrated. See UNHRC Res S-16/1 (n 1073), para 7.

<sup>1199</sup> For e.g. at the adoption of UNSC Res 1973 France argued: ‘We do not have much time left. It is a matter of days, perhaps even hours. Every hour and day that goes by means a further clampdown and repression for the freedom-loving civilian population, in particular the people of Benghazi. Every hour and day that goes by increases the burden of responsibility on our shoulders’. Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498. Protecting the population of Benghazi was also expressly referred to in UNSC Res 1973 (n 1073), para 4.

possibly been perpetrated;<sup>1200</sup> and (iii) peaceful responsive measures have been or would be inadequate.<sup>1201</sup>

This continuum is also important at a policy level. The differing “tipping points” for activation seem to correspond with where the international community considers that, at least in principle, a balance can be struck between (i) ensuring that secondary RtoP is effective; and (ii) the specific concerns of States which the potential discharge of secondary RtoP’s assistance, peaceful and non-peaceful responsive measures prompt. In terms of assistance measures, requiring the population to sustain some harm before the international community initiates their offers to “help” and “encourage” States to protect their population, and that consent is provided to the assistance offered, can help overcome some of the policy concerns that exist over discharging secondary RtoP for preventive purposes. States like Bangladesh,<sup>1202</sup> Viet Nam<sup>1203</sup> and Iran<sup>1204</sup> have all raised concern that secondary RtoP’s assistance component could be used as a pretext for interfering in a State’s internal affairs before any signs emerge to suggest that a population may sustain RtoP-type harm. Similarly, States like Ireland,<sup>1205</sup> Brazil<sup>1206</sup> and Mexico<sup>1207</sup> have urged that secondary RtoP’s assistance component should be discharged in exceptional circumstances. Admittedly, providing assistance after the population sustains RtoP-type harm seems to undermine the commitment to provide assistance ‘before crises and conflicts break out’.<sup>1208</sup> However, it is important to recall that this provision (i) was separated from the Outcome Document’s other international assistance provisions; and (ii) has not been explicitly invoked to justify protective action in practice to date. Thus, there is scope to argue that this provision simply affirms that, in any event, the international community can provide assistance to States through a range of mechanisms, such as development assistance.

Segregating the “tipping point” for the use of peaceful and non-peaceful responsive

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<sup>1200</sup> For example, the Security Council referred to the fact that crimes against humanity “may” be occurring when authorising sanctions and the use of armed force in Libya. See UNSC Res 1970 (n 1073), preambular para 6 and UNSC Res 1973, *ibid*, preambular para 7.

<sup>1201</sup> Outcome Document (n 1058), para 139.

<sup>1202</sup> Statement of the Representative of *Bangladesh* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

<sup>1203</sup> Statement of the Representative of *Viet Nam* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

<sup>1204</sup> Statement of the Representative of *Iran* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

<sup>1205</sup> Statement of the Representative of *Ireland* to the UNGA in UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (24 July 2009) UN Doc GA/10849 <<http://www.un.org/News/Press/docs/2009/ga10849.doc.htm>> accessed 2 January 2012. (UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’).

<sup>1206</sup> Statement of the Representative of *Brazil* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

<sup>1207</sup> Statement of the Representative of *Mexico* to the UNGA in UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 1205).

<sup>1208</sup> Outcome Document (n 1058), para 139.

measures helps to make the framework more politically palatable to States. Providing that peaceful responsive measures should be discharged to ‘help to protect’<sup>1209</sup> populations denotes that the international community will not take sole responsibility for protection at this stage. This reflects the understanding that, whilst the protection of human rights is not an ‘exclusive affair’<sup>1210</sup> of States, the international community should typically first seek to resolve the situation peacefully under Chapter VI of the UN Charter or through the application of pacific measures by regional organisations.<sup>1211</sup> Furthermore, the additional criteria of “manifest failure”<sup>1212</sup> and “inadequacy of peaceful means”<sup>1213</sup> for the activation of non-peaceful responsive measures helps to codify the factual threshold for when the international community’s ‘concern’<sup>1214</sup> in protecting human rights can legitimately evolve to non-peaceful action against a State, such as through the application of Chapter VII enforcement measures.

Admittedly, a sliding scale/continuum approach to the international community’s role in internal protection matters is not entirely novel. Indeed, the role of the international community in minority protection issues also has an *ascending* character which loosely operates along a continuum.<sup>1215</sup> Prior to harm being sustained by minorities, the role of the international community’s role is the more general function of encouraging and promoting respect for human rights by all States.<sup>1216</sup> When minorities have sustained isolated instances of harm, the role of external actors has been typically supervisory, advising national authorities on the steps that they could take to avoid a recurrence of such harm in the future (e.g. recommending changes to national policies).<sup>1217</sup> Finally, it has been long since recognised that widespread harm to minorities, such as that perpetrated inside the context of

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<sup>1209</sup> Outcome Document (n 1058), para 139, emphasis added.

<sup>1210</sup> CSCE, ‘Report of the CSCE Meeting of Experts on National Minorities in Geneva’ (1991), section 3, para 3 <<http://www.osce.org/hcnm/14588>> accessed 14 November 2012 (CSCE, ‘Report of the CSCE Meeting of Experts on National Minorities in Geneva’). OSCE High Commissioner for National Minorities, *The Bolzano/Bozen Recommendations on National Minorities and Inter-State Relations and Explanatory Note* (OSCE HCNM, the Netherlands 2008) 11-12. (OSCE HCNM, *The Bolzano/Bozen Recommendations*).

<sup>1211</sup> The UNSG notes that the Outcome Document wording on peaceful responsive measures ‘suggests that the intent is for this to be an ongoing, generic responsibility that employs the kind of peaceful, pacific measures specified in Chapter VI and in Article 52, Chapter VIII’. Furthermore, although the UNSG notes that ‘there is no room for a rigidly sequenced strategy or for tightly defined “triggers” for action’, the activating ‘threshold for Chapter VI measures would be lower than the threshold for enforcement action under Chapter VII’. UNSG Report 2009, Implementing RtoP (n 1066), 22.

<sup>1212</sup> Outcome Document (n 1058), para 139.

<sup>1213</sup> Outcome Document, *ibid*.

<sup>1214</sup> CSCE, ‘Report of the CSCE Meeting of Experts on National Minorities in Geneva’ (n 1210), section 3, para 3 and OSCE HCNM, *The Bolzano/Bozen Recommendations* (n 1210), 11-12.

<sup>1215</sup> The fact that the international community’s role in the field of minority protection can be considered to form a continuum is outlined in detail by Nasic. See generally, H Nasic, ‘Minority Rights Instruments and Mechanisms: Minority Protection along the Conflict Continuum’, EURAC Research, European Academy (2007).

<sup>1216</sup> United Nations, *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 1 (3).

<sup>1217</sup> A primary example would be the monitoring and reporting functions of the Committee on the International Covenant on Civil and Political Rights, particularly in relation to the implementation of Article 27. International Covenant on Civil and Political Rights 1966 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 27.

ethnic conflict, may constitute a threat to stability, peace and security.<sup>1218</sup> In such instances, the role of external actors is more robust and direct, involving the collective security mandates of the UNSC and/or regional organisations.

Notwithstanding these overlaps, secondary RtoP's "sliding scale" approach appears to represent value added by better coordinating and structuring the international community's specific roles at each "tipping point". The sliding scale approach to the activation of the international community's involvement in minority protection issues is approached in a somewhat *disjointed* manner. Relevant instruments fail to explicitly link the varying roles that the international community can have in a minority protection context. For example, there is no express clarification of the point at which the international community's 'concern'<sup>1219</sup> in the protection of minorities should shift to the 'important role'<sup>1220</sup> that it has 'to play'<sup>1221</sup> in ensuring this protection. In contrast, the Outcome Document places the international community's varying roles in RtoP cases, and the triggers for these respective roles, into a *coherent framework*. It clarifies that the general basis for the international community's role under secondary RtoP is linked to protecting populations *from RtoP crimes*<sup>1222</sup> (i.e. imminence). It defines the overarching purpose of each of the means available (i.e. assistance to national authorities,<sup>1223</sup> help in protecting populations,<sup>1224</sup> and response to a failure to protect<sup>1225</sup>). In doing so, the Outcome Document helps to contour the kind of cases in which the international community should take a particular role. For example, that (i) assistance should be given when relevant authorities lack the capacity to protect the population and these authorities request, or consent to, the provision of assistance; and (ii) non-peaceful responsive measures should be discharged when the harm sustained by a population is of the gravest form;<sup>1226</sup> assistance or peaceful responsive measures would be inadequate routes<sup>1227</sup> through which to ensure populations' protection.

Arguably, added value to the international community's role in the field of minority protection may also arise by reason of constructing secondary RtoP's activation around a *continuum* of competing "tipping points". As noted above, dividing the "tipping points"

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<sup>1218</sup> As Temperley explains the rationale which partly underscored the Paris Peace Conference was the threat to peace and stability which emanated from the minorities within the new States: 'Nothing would be so likely to produce war in the future as justifiable discontent among the transferred populations'. H V Temperley, *A History of the Peace Conference of Paris: Vol V* (OUP, London 1921) 121.

<sup>1219</sup> CSCE, 'Report of the CSCE Meeting of Experts on National Minorities in Geneva' (n 1210), section 3, para 3 and OSCE HCNM, *The Bolzano/Bozen Recommendations* (n 1210), 11-12.

<sup>1220</sup> UNGA Res 47/135, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities' (18 December 1992) UN Doc A/RES/47/135, preambular para 7. (UNGA, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities').

<sup>1221</sup> UNGA, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities', *ibid*.

<sup>1222</sup> Outcome Document (n 1058), paras 138-139.

<sup>1223</sup> Outcome Document, *ibid*.

<sup>1224</sup> Outcome Document, *ibid*, para 139.

<sup>1225</sup> Outcome Document, *ibid*.

<sup>1226</sup> This stems from the criteria of 'manifest failure'. Outcome Document, *ibid*.

<sup>1227</sup> This stems from the requirement that 'peaceful means would be inadequate'. Outcome Document, *ibid*.

essentially regulates when the international community's 'legitimate concern'<sup>1228</sup> in protection issues takes precedence (and the extent to which it takes precedence) over respect for State sovereignty, territorial integrity and non-intervention in internal affairs. To this effect, a fundamental difference between protecting populations under secondary RtoP and protecting minority rights is that it is only in the latter case that there is an *explicit requirement* for enforcement to be in full respect for State sovereignty and territorial integrity.<sup>1229</sup> The provision is designed to safeguard against the implication that the minority rights provided therein can be used in a manner contrary to a State's sovereignty and territorial integrity. These provisions help to alleviate concerns that a minority group may claim some form of autonomous arrangement within the State or to secede from it.<sup>1230</sup> They also help to mitigate the risk that members of the international community will invoke their 'concern'<sup>1231</sup> and 'important role'<sup>1232</sup> in minority protection, in particular Kin States, as a pretext for undermining the sovereignty and territorial integrity of the third State in which a particular minority group resides.<sup>1233</sup> Omitting a similar qualification to secondary RtoP's discharge is therefore a novel approach to balancing the international community's ability to take protective action and the State's ability to have respect for its sovereignty and territorial integrity and non-interference.

### 1.2.2 Present Literature

Some commentators<sup>1234</sup> allude to the possibility that the activating thresholds for secondary RtoP's components are segregated. Whilst Bellamy argues that there would need to be 'compelling evidence of genocide or mass atrocities'<sup>1235</sup> in order to activate a 'timely and decisive'<sup>1236</sup> response, Scheffer<sup>1237</sup> observes that not all situations entailing RtoP crimes

<sup>1228</sup> CSCE, 'Report of the CSCE Meeting of Experts on National Minorities in Geneva' (n 1210), section 3, para 3 and OSCE HCNM, *The Bolzano/Bozen Recommendations* (n 1210), 11-12.

<sup>1229</sup> For e.g. the UNGA Declaration on the Rights of Persons Belonging to National, Ethnic, Linguistic or Religious Minorities provides that '[n]othing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States'. UNGA, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities' (n 1220), art 8 (4).

<sup>1230</sup> On this see e.g. W Kymlicka, 'The Internationalisation of Minority Rights' (2008) 6 (1) ICON 1, 6-7 and P Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 (4) ICLQ 867, 874.

<sup>1231</sup> CSCE, 'Report of the CSCE Meeting of Experts on National Minorities in Geneva' (n 1210), section 3, para 3. See further, OSCE HCNM, *The Bolzano/Bozen Recommendations* (n 1210), 11-12.

<sup>1232</sup> UNGA, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities' (n 1220), preambular para 7.

<sup>1233</sup> OSCE HCNM, *The Bolzano/Bozen Recommendations* (n 1210), 11-12. See further, Venice Commission, 'Report of the Preferential Treatment of National Minorities by their Kin State' (2001) Doc. CDL/INF, 21-23 <[http://www.venice.coe.int/docs/2001/CDL-INF\(2011\)019-e.pdf](http://www.venice.coe.int/docs/2001/CDL-INF(2011)019-e.pdf)> accessed 18 June 2012.

<sup>1234</sup> See especially, A Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (Routledge, Abingdon 2011) 69 and Scheffer (n 1110), 77.

<sup>1235</sup> Bellamy, *ibid*, emphasis added.

<sup>1236</sup> Outcome Document (n 1058), para 139.

<sup>1237</sup> Scheffer (n 1110), 77.

would activate non-peaceful responsive measures. Recognising that the activation of non-peaceful responsive measures would require more ‘compelling’<sup>1238</sup> evidence of RtoP crimes and that such measures may not apply to all RtoP situations<sup>1239</sup> acknowledges, albeit indirectly, that secondary RtoP’s activation may not be approached in a standard manner but, rather, on the basis of a sliding scale.

Wider arguments in the literature<sup>1240</sup> have a bearing on the potential implications of segregating secondary RtoP’s activating thresholds. Scheffer<sup>1241</sup> warns that ‘[d]rawing the line between atrocity crimes that would merit and those that would lack justification for military intervention could become an extremely difficult task in world affairs’.<sup>1242</sup> On the one hand, the present author considers that this potential implication can be circumvented. To this effect, practice appears to have taken into account not only the nature of the RtoP crimes at issue but whether they threaten a *large section* of the population. Thus, assessing the *scale* of the threat of harm to a population seems to represent one basis on which to distinguish those cases which activate non-peaceful responses from those which do not. Conversely, determining which component of secondary RtoP is activated on the basis of the nature, gravity and scale of harm sustained by a population can mean that relevant actors would have to rely more upon the legal definition of RtoP crimes when making decisions on activation. Rosenberg<sup>1243</sup> argues that drawing upon these definitions would ‘ensure the immediate demise of the normative concerns embedded within the RtoP — most of all its ability to proactively attempt to prevent imminent or on-going forms of mass atrocities based on existing legal obligations’.<sup>1244</sup> Admittedly, basing activation on the emergence of the legal elements of RtoP crimes tends to undermine secondary RtoP’s application for the purpose of preventing a population sustaining *any* RtoP-type harm. However, it is important to distinguish the RtoP framework as *it stands* from what we would *ideally like* it to be.<sup>1245</sup> In this line, we should recall that the Outcome Document’s repeated references to protecting the population ‘from’<sup>1246</sup> four specific crimes, not human rights violations *per se*, suggests that States did not want to formulate secondary RtoP as that which could be activated at a *very early stage*. Indeed, Rosenberg herself notes that the drafting of the Outcome Document suggests that the decision to formulate RtoP around the four crimes was made ‘in order to limit the application of the RtoP to exceptional grave situations, where international law had

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<sup>1238</sup> A Bellamy, *Global Politics and The Responsibility to Protect: From Words to Deeds* (n 1234), 69.

<sup>1239</sup> Scheffer (n 1110), 77.

<sup>1240</sup> Scheffer, *ibid* and Rosenberg and Strauss (n 1067), 55-72.

<sup>1241</sup> Scheffer, *ibid*.

<sup>1242</sup> Scheffer, *ibid*.

<sup>1243</sup> Rosenberg and Strauss (n 1067), 55-72.

<sup>1244</sup> Rosenberg and Strauss, *ibid*, 55.

<sup>1245</sup> This was a point made by the (now former) UN Special Adviser on RtoP. E C Luck, ‘The Normative Journey: The Evolution of the RtoP Concept’ (Keynote address at the European Science Foundation ‘The Responsibility to Protect from Principle to Practice’ Conference, Linköping, Sweden, 9 June 2010).

<sup>1246</sup> Outcome Document (n 1058), para 139.

already defined limitations to the principle of sovereignty’.<sup>1247</sup> As noted earlier, a sliding scale approach to activation may actually help to further clarify where ‘international law’<sup>1248</sup> has ‘already defined limitations to the principle of sovereignty’<sup>1249</sup> and the specific ways in which the international community should respond to those limitations (i.e. assistance, peaceful or non-peaceful responses). This helps to diminish the prospect, or at least the legitimacy, of invoking secondary RtoP as a pretext for interfering in the internal affairs of a State wherein no RtoP-type harm to the population has occurred, thereby making the RtoP framework politically palatable to States. Furthermore, it does not necessarily follow from segregating secondary RtoP’s activating thresholds that secondary RtoP cannot be applied for preventive purposes, not least because practice to date suggests that there is no requirement for *all* legal elements of RtoP crimes to be established.

Constructing secondary RtoP’s activation as a continuum with separate “tipping points” also tends to call into question some commentators<sup>1250</sup> views on the significance of the Outcome Document “manifest failure”<sup>1251</sup> and “inadequacy of peaceful means”<sup>1252</sup> criteria. Stahn<sup>1253</sup> is a good example. He argues that the Outcome Document creates a ‘complementarity trap’<sup>1254</sup> by enabling the international community to argue that the aforementioned criteria have not been met in a particular case and, therefore, that the protection of populations remains the task of the State under primary RtoP. The present author does not find this view compelling because it tends to overlook the heterogeneous nature of the measures available under secondary RtoP and their individual tipping points. To this effect, we should recall that in practice the abovementioned criteria appear to have been considered to only regulate the activation of non-peaceful responsive measures and, therefore, to not inhibit the activation of assistance or peaceful responsive measures.<sup>1255</sup> Furthermore, we should acknowledge that no formula will be effective if there is not the political will to undertake the measure activated. To this end, a general difficulty in international relations is the fact that there is a fundamental difference between declaring a responsibility to take a particular course of action in specific circumstances and discharging that responsibility when those circumstances arise. Here, reference can be made to the persuasive argument that international inaction to mass atrocity crimes has never been the

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<sup>1247</sup> Rosenberg and Strauss (n 1067), 59.

<sup>1248</sup> Rosenberg and Strauss, *ibid*.

<sup>1249</sup> Rosenberg and Strauss, *ibid*.

<sup>1250</sup> See particularly, Bellamy, ‘Responsibility to Protect or Trojan Horse?’ (n 1067); Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (n 1067); Stahn, ‘RtoP, the ICC and the Libyan Arrests’ (n 1067); Payandeh (n 1067); Wheeler, ‘A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit’ (n 1067) and Rosenberg and Strauss, *ibid*, 72.

<sup>1251</sup> Outcome Document (n 1058), para 139.

<sup>1252</sup> Outcome Document, *ibid*.

<sup>1253</sup> Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (n 1067).

<sup>1254</sup> Stahn, *ibid*, 116.

<sup>1255</sup> Contrast for instance, EP Res, ‘The Tragic Situation in Burma’ (n 1184), paras 3, K and para 11 and EP Res, ‘The Situation in Darfur’ (n 1139), para E.

result of ignorance to the commission of RtoP crimes or a lack of means through which to respond to them but, rather, a *disinclination* to set aside all other interests ‘in the name of humanity’.<sup>1256</sup> Consideration should therefore be given to the institutional aspects of the activation process and the possible implications thereof, not least the role of political will.

## 2 Institutional Aspects of the Activation Process

In practice, secondary RtoP’s activation has not been determined by a single authority but, rather, by whichever body happens to be considering the RtoP situation at issue. This includes the UNSC,<sup>1257</sup> UNHRC<sup>1258</sup> and regional organisations.<sup>1259</sup> This is consistent with the UNSG’s recommendation to adopt an ‘inter-agency’<sup>1260</sup> approach to secondary RtoP’s discharge. Nevertheless, the UNSC appear to have a primary, if not exclusive, role regarding the activation of non-peaceful responsive measures like those under Chapter VII of the UN Charter. To this effect, the Outcome Document clearly states that non-peaceful responses will be undertaken ‘*through the UNSC*’.<sup>1261</sup> The role of relevant bodies in secondary RtoP’s activation merits further reflection. Two particularly interesting bodies to consider are the UNSC and the UNHRC.

### 2.1 The UN Security Council

The Syria case study is a particularly good example of the UNSC’s role in secondary RtoP’s activation to date, not least because of the widespread controversies which have surrounded the international community’s involvement in this specific situation. On the one hand, some actors explicitly outlined that there was a need to protect the Syrian population from RtoP crimes and, therefore, that secondary RtoP be activated.<sup>1262</sup> However, other States<sup>1263</sup> played

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<sup>1256</sup> See for e.g. A Bellamy, ‘The Responsibility to Protect and the Problem of Regime Change’ (27 September 2011) <[www.e-ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change/](http://www.e-ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change/)> accessed 12 July 2012 and L. Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’ (2008) 34 *Review of International Studies* 445, 456.

<sup>1257</sup> For e.g. UNSC Res 1755 (2007) UN Doc S/RES/1755; UNSC Res 1706 (2006) UN Doc S/RES/1706; UN Doc S/RES/1769 (2007) UN Doc S/RES/1769; UNSC Res 1970 (n 1073); UNSC Res 1973 (n 1073) and UNSC Res 1975 (n 1073).

<sup>1258</sup> For e.g. UNHRC Res S-15/1 (n 1073), para 2 and UNHRC, ‘Report of the High-Level Mission on the Situation of Human Rights in Darfur’ (n 1113).

<sup>1259</sup> For e.g. EP Res, ‘On the Southern Neighbourhood and Libya in particular’ (n 1184); EP Res, ‘The Situation in Zimbabwe’ (n 1184); EP Res, Situation in Syria, Bahrain and Yemen in the Context of the Situation in the Arab World and North Africa’ (n 1147); EP Res, ‘Expulsion of NGO’s from Darfur’ (n 1184) and EP Res, ‘The Tragic Situation in Burma’ (n 1184).

<sup>1260</sup> UNSG Report 2009, Implementing RtoP (n 1066), 32.

<sup>1261</sup> Outcome Document (n 1058), para 139, emphasis added.

<sup>1262</sup> See particularly: Statements of the Representative of *Germany* and *Colombia* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627; Statements of the Representatives of *Portugal* and the *United Kingdom* to the UNSC, UNSC Verbatim Record (27 April 2011) UN Doc S/PV.6524; Statement of the



down the possibility that RtoP crimes are imminent in a State and therefore that it would be appropriate to apply secondary RtoP. For instance, Russia<sup>1264</sup> and China<sup>1265</sup> vetoed a draft Resolution<sup>1266</sup> which condemned the situation in Syria,<sup>1267</sup> recalled the Syrian authorities' primary RtoP duty<sup>1268</sup> and outlined the UNSC's preparedness to authorise further measures, as appropriate.<sup>1269</sup> Neither of these States suggested that the situation entailed RtoP crimes but, instead, commented that there was 'violence'<sup>1270</sup> inside Syria. Similarly, it is notable that Russia did not join other States in describing the killings at Houla<sup>1271</sup> as a "massacre" but, rather, as an 'incident which left civilians dead'.<sup>1272</sup> In addition, both States pushed for the UNSC to refrain from blaming the Syrian authorities for the harm to the population and to instead, refrain from violating the principle of non-interference in internal affairs<sup>1273</sup> by condemning all violence equally.<sup>1274</sup> To Lebanon<sup>1275</sup> and India,<sup>1276</sup> it was important to acknowledge that Syrian national authorities have a right to take whatever action necessary

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Representative of the *United States* to the UNSC, UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711; Draft UN Security Council Resolution (4 February 2012) UN Doc S/2012/77, para 5 (a) (Draft Resolution vetoed by Russia and China, see voting record in UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711. (Draft UNSC Res, 4 February 2012).

<sup>1263</sup> Primary examples are Russia and China. See for e.g. Statements of the Representatives of the *Russian Federation* and *China* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627.

<sup>1264</sup> Statement of the *Russian Federation* to the UNSC, *ibid*.

<sup>1265</sup> Statement of the Representative of *China* to the UNSC, *ibid*.

<sup>1266</sup> Draft UN Security Council Resolution (4 October 2011) UN Doc S/2011/612 (Draft UNSC Res, 4 October 2011). Russia and China also vetoed a draft Resolution proposed in February 2012 which: (i) recalled the Syrian authorities primary RtoP duty (preamble para 2); (ii) called on the regime to ensure the free and unhindered access to humanitarian agencies and the UNHRC Commission of Inquiry (paras 12 and 11); (iii) condemned the situation inside Syria (paras 2 and 3); (iv) called for full compliance with the Arab League's November 2011 Plan of Action and January 2012 decision which, *inter alia*, required protection of the population (para 5); and (v) affirmed that the draft Resolution did not provide for measures under Article 42 of the UN Charter i.e. for the UNSC to authorise the use of armed force (para 10). See the aforementioned paragraphs of Draft UNSC Res, 4 February 2012 (n 1262).

<sup>1267</sup> Draft UNSC Res, 4 October 2011, *ibid*, preamble paras 2, 9 and para 1.

<sup>1268</sup> Draft UNSC Res, 4 October 2011, *ibid*, para 5.

<sup>1269</sup> Draft UNSC Res, 4 October 2011, *ibid*, para 11 [*'Expresses its intention to review Syria's implementation of this resolution within 30 days and to consider its options, including measures under Article 41 of the Charter of the United Nations'*, emphasis original].

<sup>1270</sup> Statements of the Representatives of the *Russian Federation* and *China* to the UNSC, UNSC Verbatim record (4 October 2011) UN Doc S/PV.6627.

<sup>1271</sup> Statement of the Foreign Minister of the *United Kingdom* at a press conference in Moscow cited in 'Both Parties Guilty in Houla Massacre - Lavrov' (Russia Today, 28 May 2012) <<http://www.rt.com/news/peace-plan-syria-regime-374/>> accessed 30 May 2012.

<sup>1272</sup> Statement of the Foreign Minister of the *Russian Federation*, *ibid*.

<sup>1273</sup> Statements of the Representatives of the *Russian Federation* and *China* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV. 6627.

<sup>1274</sup> Statements of the Representatives of the *Russian Federation* and *China* to the UNSC, *ibid*.

<sup>1275</sup> Lebanon stated: 'Permit me once again to say that, given the events unfolding in Syria, Lebanon would like to defend that brotherly Arab country and *its right to sovereignty and the integrity of its people and land, including the right to ensure the security and safety of all its citizens*'. Statement of the Representative of *Lebanon* to the UNSC, UNSC Verbatim Record, *ibid*, emphasis added.

<sup>1276</sup> India argued: 'While the right of people to protest peacefully is to be respected, *States cannot but take appropriate action* when militant groups — heavily armed — resort to violence against State authority and infrastructure [...] The international community should give time and space for the Syrian Government to implement the far-reaching reform measures they have announced. For this, it is also necessary that the opposition forces in Syria give up the path of armed insurrection and engage constructively with the authorities. We firmly believe that the actions of the international community should facilitate engagement of the Syrian Government and the opposition in a Syrian-led inclusive political process, and *not complicate the situation by threats of sanctions, regime change, et cetera*'. Statement of the Representative of *India* to the UNSC, UNSC Verbatim Record, *ibid*, emphasis and ellipsis added.

to protect their population from “terrorists”. These views tend to suggest that some UNSC members distinguish Syria from situations involving RtoP crimes whereby one side is considered to be undertaking, for example, a ‘widespread and systematic attack directed against any civilian population’.<sup>1277</sup> Rather, it connects Syria more to the context of a civil war in which the international community should abide by the principles of *impartiality* and *neutrality*. To the United States,<sup>1278</sup> Russia and China’s vetoes were the outcome of these States considering that the human rights violations being committed in Syria were *not sufficiently grave* to represent a threat to international peace and security. Accordingly, there is scope to argue that one effect of *coupling* the perpetration of mass atrocity crimes with an international protective “responsibility” is that it can, at least in some cases, lead some States to *deliberately avoid* recognising that RtoP crimes are imminent.

Other policy issues underscored the standpoints of Russia and China, however. Both States<sup>1279</sup> cautioned against the UNSC interfering in the internal affairs of a State. Furthermore, alluding to the application of secondary RtoP in Libya, Russia raised concerns over the international community using RtoP as a means of *standardising* its approach to cases such as this, including the risk of harm to civilians when armed force is used.<sup>1280</sup> To this effect, Russia urged that ‘these types of models’ for protecting populations ‘should be excluded from global practices once and for all’.<sup>1281</sup> The possibility that international action could actually *encourage* the opposition groups to continue their struggle against the regime was also referred to.<sup>1282</sup> Indeed, Russia appeared to consider that international action which appears to support the rebels over the regime could threaten regional peace and security by creating a civil war.<sup>1283</sup>

The reference to wider policy issues is interesting. The Outcome Document provides that non-peaceful responsive measures will be undertaken ‘through the Security Council, on a case-by-case basis’.<sup>1284</sup> There are two possible interpretations of the phrase ‘case-by-case basis’.<sup>1285</sup> The first is that it means that the UNSC should establish whether the criteria of manifest failure and inadequacy of peaceful means have been met on the basis of the *specific circumstances of each case*. The second is that the UNSC will retain discretion over whether

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<sup>1277</sup> Rome Statute (n 1150), art 7 (1).

<sup>1278</sup> Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627.

<sup>1279</sup> Statements of the Representatives of the *Russian Federation* and *China* to the UNSC, *ibid*.

<sup>1280</sup> Statement of the Representative of the *Russian Federation* to the UNSC, *ibid*.

<sup>1281</sup> Statement of the Representative of the *Russian Federation* to the UNSC, *ibid*.

<sup>1282</sup> Statement of the Representative of the *Russian Federation* to the UNSC, *ibid*. [‘Recent events convincingly show that the radical opposition no longer hides its extremist bent and is relying on terrorist tactics, *hoping for foreign sponsors* and acting outside of the law’, emphasis added].

<sup>1283</sup> Statement of the Representative of the *Russian Federation* to the UNSC, *ibid*. [‘Given the basis of statements by some *Western politicians on President Al-Assad’s loss of legitimacy*, such an approach could *trigger a full-fledged conflict* in Syria and *destabilisation in the region as a whole*’, emphasis added].

<sup>1284</sup> Outcome Document (n 1058), para 139.

<sup>1285</sup> Outcome Document, *ibid*.

to apply non-peaceful responsive measures even when the criteria are met in a case because of a whole host of wider considerations that the Outcome Document does not discuss. There is limited guidance in State views with regard to the meaning of this provision. However, the US and China both seem to interpret the provision in accordance with the second meaning.<sup>1286</sup> Whilst the US recalled that the UNSC has never been under a legal obligation to authorise enforcement measures,<sup>1287</sup> China stresses that the UNSC will ‘try its very best to use peaceful means’<sup>1288</sup> and make its decision over the application of non-peaceful measures on a ‘cautious basis’<sup>1289</sup> and with account of ‘conditions on the ground’.<sup>1290</sup> Whilst this is only two States, their views carry increased significance because both are members of the P5. This writer would therefore suggest that the language of the Outcome Document may actually legitimate some of the wider political considerations that have been taken into account in the Syrian case study, such as the risk of international action encouraging the rebels to continue with their struggle. This tends to undermine the capacity for secondary RtoP to add value by helping to *contour the circumstances* in which the UNSC should generally determine that an RtoP situation represents a threat to international peace and security and, therefore, the activation of its existing Charter mandate.<sup>1291</sup>

Payandeh<sup>1292</sup> would question whether the development of a specific “tipping point” for the UNSC to recognise secondary RtoP’s activation is necessary. She argues that the Outcome Document criteria would have limited bearing on UNSC practice because ‘it is hardly conceivable that the Security Council could acknowledge a case of massive human rights violations without recognising a manifest failure of the State’.<sup>1293</sup> The present writer does not find this view compelling for a number of reasons. First, the argument tends to presume that the UNSC will acknowledge that RtoP cases entail ‘massive human rights violations’.<sup>1294</sup> As noted earlier, some States<sup>1295</sup> may avoid acknowledging that the level of

<sup>1286</sup> Brunnee also seems to favour this interpretation. She argued that the Outcome Document provided for a non-peaceful response to be considered on a ‘case-by-case basis’ in order to ensure that the Security Council’s Chapter VII mandate is *not* activated in every case where there is scope to argue that (i) RtoP crimes are imminent; (ii) peaceful means would be inadequate; and (iii) national authorities are manifestly failing to protect the population. J Brunnee and S Toope, “The Responsibility to Protect and the Use of Force: Building Legality” in Bellamy, Davies and Glanville (n 1154) 76.

<sup>1287</sup> Letter of the US Ambassador John Bolton to the UNGA President (n 1171).

<sup>1288</sup> Statement of the Representative of *China* to the UNGA, ‘Informal Meeting of the UNGA on the Draft Outcome Document of the September Summit’ (21 June 2005)

<[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 7 August 2012.

<sup>1289</sup> Statement of the Representative of *China* to the UNGA, *ibid*.

<sup>1290</sup> Statement of the Representative of *China* to the UNGA, *ibid*.

<sup>1291</sup> Payandeh makes a similar argument: Unlike Article 24 (1) of the UN Charter, which refers only to the responsibility of the Security Council for peace and security, the responsibility to protect links the power of the Security Council explicitly to the humanitarian responsibility for the well-being of individuals’. Payandeh (n 1067), 501.

<sup>1292</sup> Payandeh, *ibid*.

<sup>1293</sup> Payandeh, *ibid*, 498.

<sup>1294</sup> Payandeh, *ibid*.

<sup>1295</sup> Primary examples are Russia, China, Lebanon and India in relation to the situation in Syria. See Statements of the Representatives of the *Russian Federation*, *Lebanon*, *India* and *China* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.662.

harm sustained by a population suggests that RtoP crimes are imminent in order to evade the activation of secondary RtoP. Accordingly, ‘massive human rights violations’<sup>1296</sup> may not be recognised for the very reason that this denotes the ‘manifest failure of the State’<sup>1297</sup> and, therefore, creates the requisite ‘nexus’<sup>1298</sup> between the situation at issue and secondary RtoP’s activation. Second, the argument undermines the logic behind basing secondary RtoP’s activation on four specific crimes, namely that there are many cases of ‘massive human rights violations’<sup>1299</sup> which will not necessarily overlap with the kind of crimes covered by RtoP. For instance, a State may perpetrate numerous violations of certain socio-economic rights without necessarily suggesting that RtoP crimes are imminent and, therefore, activating secondary RtoP. Finally, the argument tends to undermine the value of establishing that a State’s failure to protect its population from RtoP crimes should be “manifest”. If applied correctly in practice, this could help the UNSC to determine the *precise* point at which they *should* apply specific enforcement measures under Chapter VII.

However, a review of the UNSC’s role in decisions regarding secondary RtoP’s activation to date also suggests that the factors taken into account in order to determine the manifest failure of the State can also be controversial. The link between secondary RtoP’s activation and the imminence of the mass atrocity crimes that RtoP covers has led the UNSC to draw increasingly upon international law. This has led to the view that the UNSC is being required to act, to all intents and purposes, like a court. This opinion came through in India’s<sup>1300</sup> statement regarding the UNSC’s response to the situation in the Côte d’Ivoire. India<sup>1301</sup> argued that:

‘The Council has heard various allegations of serious crimes committed against civilians in Côte d’Ivoire. There should be *no a priori presumption about the nature of these alleged crimes*. Each allegation has to be investigated on a case-by-case basis *by the competent national bodies*, and further action taken pursuant to relevant laws’.<sup>1302</sup>

On the one hand, practice preceding RtoP’s 2005 adoption suggests that there could be some merit to India’s argument. In relation to the situation in Darfur in 2004, Algeria<sup>1303</sup> argued that the UNSC has:

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<sup>1296</sup> Payandeh (n 1067), 498.

<sup>1297</sup> Payandeh, *ibid*.

<sup>1298</sup> As Stahn notes, the reference to crimes against humanity occurring in Libya in UNSC Res 1973 ‘may have been used to establish a nexus to the R2P doctrine’. C Stahn, ‘Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’ (2012) 10 (2) J Int Crim Justice 325, 329.

<sup>1299</sup> Payandeh (n 1067).

<sup>1300</sup> Statement of the Representative of *India* to the UNSC, UNSC Verbatim Record (30 March 2011) UN Doc S/PV.6508.

<sup>1301</sup> Statement of the Representative of *India* to the UNSC, *ibid*.

<sup>1302</sup> Statement of the Representative of *India* to the UNSC, *ibid*, emphasis added.

<sup>1303</sup> Statement of the Representative of *Algeria* to the UNSC, UNSC Verbatim Record (18 September 2004) UN Doc S/PV.5040.

‘[W]isely set aside, at least for the time being, the question of whether or not genocide had been committed, so as not to disrupt or jeopardise the delivery of humanitarian assistance and the ongoing African Union efforts aimed at reaching a political settlement’.<sup>1304</sup>

Algeria’s statement highlights that referring to the possible crimes being perpetrated in a specific situation could be problematic in cases where the international community envisages discharging secondary RtoP through assistance measures. Reference to the possible perpetration of mass atrocity crimes can appear to the State at issue that it is being *prejudged* by the international community. This could potentially undermine the prospect of the national authorities cooperating with the international community by providing consent for the provision of assistance. Thus, in some cases it may be difficult to fully reconcile the dual requirements for the activation of secondary RtoP’s assistance component (i.e. consent and imminence). Furthermore, referring to legally defined mass atrocity crimes in political decision making can, in cases involving the UNSC’s authorisation of the use of armed force, entail the implication of further blurring the line between ‘military and judicial intervention’.<sup>1305</sup> To this effect, Stahn<sup>1306</sup> observes that the UNSC’s reference to crimes against humanity in Resolution 1973 underscored the International Criminal Court’s decision to release a statement outlining ‘its commitment to the *preservation of independence and impartiality*’.<sup>1307</sup> Thus, there is a need for political bodies to exercise sufficient caution when referring to the possible perpetration of specific mass atrocity crimes, if only to ensure that this does not compromise or undermine the existing mandates of other actors who are also working in relation to the situation at hand.

Conversely, explicitly referring to the fact that an RtoP crime may be being perpetrated illustrates that the international community considers that the State is not complying with primary RtoP.<sup>1308</sup> Thus, the approach signals to the State concerned that the potentially ‘slippery slope’<sup>1309</sup> toward the use of armed force has commenced.

## 2.2 The UN Human Rights Council

The main issue to be explored with regard to the UNHRC is whether its role in decision making on the activation of peaceful responsive measures in practice to date can be

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<sup>1304</sup> Statement of the Representative of *Algeria* to the UNSC, *ibid*.

<sup>1305</sup> Stahn, ‘Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’ (n 1298), 329.

<sup>1306</sup> Stahn, *ibid*.

<sup>1307</sup> Stahn, *ibid*.

<sup>1308</sup> Stahn, *ibid*.

<sup>1309</sup> J E Alvarez, ‘The Schizophrenias of RtoP’ (Panel presentation at the ‘Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference’, The Hague, 30 June 2007).

*reconciled* with its existing mandate. Admittedly, there are solid reasons for permitting the UNHRC to make determinations that RtoP crimes are imminent and, therefore, that secondary RtoP has been activated. The UNHRC is mandated to assess State compliance with human rights law obligations, including through its Special Procedures.<sup>1310</sup> This can mean that the UNHRC will often be in an unparalleled position to ascertain that RtoP crimes are potentially imminent.<sup>1311</sup> Accordingly, permitting the UNHRC to have a role in determining secondary RtoP's activation can be entirely legitimate and effective in (i) preventing human rights violations from developing into RtoP crimes; and/or (ii) putting the international community on notice, through the UNHRC's fact-finding missions and other monitoring mechanisms, that the human rights violations are of the gravity and scale to suggest that RtoP crimes are imminent and, therefore, those which warrant its response.

Notwithstanding this, it is unclear whether conferring the UNHRC a role in secondary RtoP's activation is entirely consistent with the fact that it is mandated to monitor *human rights violations*, not the emergence of international *mass atrocity crimes* per se. Whilst there can be a clear overlap between the two, such as widespread violations of the right against torture and crimes against humanity, there may also be a point of departure. For example, certain violations of humanitarian law may fall outside the reach of human rights law and be solely limited to the scope of RtoP. In such instances, the UNHRC would be deprived of a legitimate basis on which to act under secondary RtoP by reason of their existing mandate. Indeed, this matter was alluded to by Pakistan (on behalf of the Organisation of the Islamic Conference<sup>1312</sup>) and Algeria (on behalf of the Arab League<sup>1313</sup>) in response to the UNHRC's determination that the situation in Darfur entailed a manifest failure of the Sudanese government to protect populations and, therefore, that the situation had activated secondary RtoP.<sup>1314</sup> Pakistan stated:

<sup>1310</sup> UNGA Resolution 60/251 (3 April 2006) UN Doc A/RES/60/251, paras 2 and 3.

<sup>1311</sup> This has been noted by several commentators. See especially: D Gierczyk, "The Responsibility to Protect: A Legal and Rights-Based Perspective" in Bellamy, Davies and Glanville (n 1154) 115-117; Arbour (n 1256), 456; P O'Brien, 'Responsibility to Protect' (2008) 20 I.J.R.L. 710, 712 and N Turner and N Otsuki, *The Responsibility to Protect Minorities and the Problem of the Kin State* (United Nations University, Tokyo 2010) 7.

<sup>1312</sup> Statement of the Representative of Pakistan (on behalf of the Organisation of the Islamic Conference) to the UNHRC in UN Press Release, 'UNHRC Discusses Report of High-Level Mission on Situation of Human Rights in Darfur' (16 March 2007) UN Doc UNHRC/07/12 <<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/E6DF2E2811EABFA3C12572A000717B7E?opendocument>> accessed 12 November 2011. (UN Press Release, 'UNHRC Discusses Report of High-Level Mission on Situation of Human Rights in Darfur').

<sup>1313</sup> Statement of the Representative of Algeria (on behalf of the Arab League) to the UNHRC in UN Press Release, 'UNHRC Discusses Report of High-Level Mission on Situation of Human Rights in Darfur', *ibid*.

<sup>1314</sup> The Report stated that the 'Mission further concludes that the Government of the Sudan has manifestly failed to protect the population of Darfur from large-scale international crimes, and has itself orchestrated and participated in these crimes. As such, the solemn obligation of the international community to exercise its *responsibility to protect* has become evident and urgent', emphasis original. UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur' (n 1113), 25. On the "manifest failure" of the Sudanese authorities, see further at 25, para 77 (a). On the activation of secondary RtoP and the Mission's proposals for the practical discharge of secondary RtoP, see also 25 at para 77 (a) and 27.

‘The mandate adopted for the mission [...] clearly stated that the mission was to assess the human rights situation in Darfur and the needs of Sudan in this regard. At no place was the concept of the “responsibility to protect” reflected in the Council’s decision. This concept, as Member States of the Council knew, had multiple political and security dimensions that went beyond the mandate given to the mission’.<sup>1315</sup>

The essence of Pakistan’s statement seems to be that the scope, and consequences for the breach, under the RtoP framework exceed both the substantive focus of the UNHRC and, moreover, the mechanisms available to it in relation to promoting accountability for the violation of human rights (e.g. encouraging the UNSC to ensure the application of collective sanctions against Sudan<sup>1316</sup>). Although this argument may have been made because of wider political reasons,<sup>1317</sup> it nevertheless highlights that concerns may be raised over the possibility that the UNHRC’s role in determining secondary RtoP’s activation could sometimes overstep its existing human rights mandate and, therefore, that it may be required to simply acknowledge that it lacks a legitimate basis on which to have a role in secondary RtoP’s activation in certain cases.

## Conclusion

By assessing trends in practice to date, the chapter outlined the potential value added and implications of the substantive and institutional aspects of secondary RtoP’s activation. Noting that secondary RtoP’s activation has been linked to the emergence of *some* of the *legal elements* of the mass atrocity crimes that RtoP covers,<sup>1318</sup> the chapter argued that the general nature of the activating threshold is one of imminence. To support this finding, this writer highlighted that in practice (i) there has been no requirement for all legal elements of RtoP crimes to be established, not least issues of mens rea; and (ii) it has been sufficient that the RtoP crime apprehended ‘may’<sup>1319</sup> be being committed. It was argued that the merit of an imminence threshold is that it enables secondary RtoP’s requisite components to entail

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<sup>1315</sup> Statement of the Representative of Pakistan (*on behalf of the Organisation of the Islamic Conference*) to the UNHRC in UN Press Release, ‘UNHRC Discusses Report of High-Level Mission on Situation of Human Rights in Darfur’ (n 1312).

<sup>1316</sup> UNHRC, ‘Report of the High-Level Mission on the Situation of Human Rights in Darfur’ (n 1113), 27.

<sup>1317</sup> The potential policy and geopolitical reasons for the viewpoints of the OIC and the Arab League in this case are outlined in part in the preceding chapter and, furthermore, are discussed in terms of their legal significance in chapter six.

<sup>1318</sup> See for e.g. Statement of the SAPG in UN DPI, ‘The United Nations and Kenya: Briefing Note’ (n 1073), 4; UNSC Res 1962 (n 1073), para 9; UN Press Release, ‘UN Special Advisors of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan’ (n 1073); UNHRC Res S-15/1 (n 1073), para 2; UNHRC Res S-16/1 (n 1073), para 1; UNSC Res 1970 (n 1073), preambular para 6; UNSC Res 1975 (n 1073), preambular para 13 and UNSC Res 1973 (n 1073), preambular para 7.

<sup>1319</sup> For instance, UNSC Res 1970, *ibid*; UNSC Res 1973, *ibid*; UNSC Res 1975, *ibid* and UNHRC Res S-15/1, *ibid*, para 1.

a preventive dimension, not explicitly provided for in the Outcome Document.<sup>1320</sup> Examination of relevant practice suggests that the imminence of RtoP crimes may be established by taking into account objective factors, such as whether (i) the members of the population sustaining the harm have the requisite identity of the protected person of the RtoP crime apprehended;<sup>1321</sup> and (ii) whether the acts at issue overlap with the actus reus of the RtoP crime apprehended.<sup>1322</sup>

Furthermore, it was noted secondary RtoP's activation appears to have occurred as per a *sliding scale*. For example, the activation of non-peaceful responsive measures, such as the use of armed force, has also taken into account whether previous measures applied have been effective in protecting the population. This writer argued that secondary RtoP's activation may therefore be best explained as a continuum of differing tipping points; each reflecting the stage at which the international community considers it is possible to reconcile the need to protect populations from RtoP crimes with the policy considerations which arise regarding secondary RtoP's varying components.

An implicit theme throughout the chapter was the extent to which secondary RtoP's activation overlaps with existing obligations and/or practice. A number of overlaps were noted, illustrating the extent to which secondary RtoP's activation fits within the existing international framework. Examples include that (i) secondary RtoP's activation as per a sliding scale tends to reflect the similarly ascending approach adopted to the international community's role in a minority protection context; (ii) the requirement for human rights violations to be of a certain gravity and scale before secondary RtoP can be activated interconnects with the requirement for harmful acts to be sufficiently substantial in order to warrant the invocation of the ICC's jurisdiction; (iii) the overlap between certain human rights violations and the actus reus of the mass atrocity crimes which RtoP covers can mean that the UNHRC can often have a legitimate role in determining secondary RtoP's activation; and (iv) an imminence concept is not unique to secondary RtoP's activation but, instead, that which is used in wider practice regarding decisions on the use of armed

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<sup>1320</sup> Outcome Document (n 1058), paras 138-139.

<sup>1321</sup> See for instance UNSC Res 1975 (n 1073), preambular para 13 and para 6; Statements of the Representatives of *Gabon*, *Côte d'Ivoire* and *Colombia* to the UNSC, UNSC Verbatim Record (30 March 2011) UN Doc. S/PV.6508; UNSC Res 1962 (n 1073), para 5; Statement of the SAPG in UN DPI, 'The United Nations and Kenya: Briefing Note' (n 1073), 4; UNHRC Res S-15/1 (n 1073), para 4; UNSC Res 1973 (n 1073), preambular paras 7 and 14; Statements of the Representatives of the *Russian Federation*, *France*, *Germany* and *Brazil* to the UNSC, UNSC Verbatim Record (26 February 2011) UN Doc S/PV.6491; Statements of the Representatives of *France*, *Lebanon*, *India*, *Colombia* and the *Russian Federation* to the UNSC, UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498; UNSC Res 1970 (n 1073), preambular paras 2 and 6; EP Res, 'The Situation in Darfur' (n 1139), paras D and 10 and 'Statement by the Special Advisers of the United Nations Secretary-General, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria', 2 June 2011 (n 1137).

<sup>1322</sup> For e.g. UNSC Res 1973, *ibid*, preambular para 7; UNSC Res 1970, *ibid*, para 6; Statement of the UN Special Advisers, *ibid* and Statement of the Representative of *Germany* to the UNSC, UNSC Verbatim Record (17 March 2011) UN Doc. S/PV.6498.



force.<sup>1323</sup> At times, the chapter highlighted the way in which existing practice can be utilised in the course of decisions on secondary RtoP's activation. For example, techniques used in the human rights context could represent one route by which to ensure that relevant actors do not overrate or underrate the nature, character, gravity and scale of the harm sustained by a population. Similarly, by drawing by analogy on the use of imminence in the context of decision making on the use of armed force, it is possible to explain the minimum requirement for secondary RtoP's activation as an apprehension that a population may sustain RtoP-type harm in anything other than the 'distant future'.<sup>1324</sup>

Casting secondary RtoP's activation against the backdrop of existing obligations/practice enables an assessment of whether secondary RtoP's activation represents value added. At a general level, value added can arise from the fact that secondary RtoP's activation does not entail the same ambiguity as humanitarian intervention. Unlike the lack of clarity that surrounded when it would be acceptable to invoke humanitarian intervention,<sup>1325</sup> secondary RtoP's activation rests upon a population sustaining, or possibly going to sustain, harm from acts which are associated with specific and legally defined mass atrocity crimes. This helps to guard against secondary RtoP following humanitarian intervention by, at least legitimately, being claimed to be activated in an indeterminate range of cases.

In the specific context of minority protection, value added mainly arises from the fact that secondary RtoP's activation clearly delineates *when* the international community's varying roles should *move* from one to another. Perhaps most significantly, secondary RtoP's activation seeks to reconcile the tension between ensuring that the international community can act to protect populations, that the principle of non-interference and territorial integrity are not unduly violated (e.g. by providing assistance to States without consent and where no harm to a population has occurred) and that these principles do not inhibit international action from being taken when RtoP crimes are imminent, a population does require 'help'<sup>1326</sup> and/or the harm sustained by a population is so grave as to suggest that national authorities have manifestly failed to fulfil primary RtoP. This contradicts existing minority protection instruments which instead qualify protective efforts upon respect for the sovereignty and territorial integrity of the State.<sup>1327</sup>

A cross-cutting theme in the chapter is the range of steps which have been taken in order to help ensure that secondary RtoP's activation is effective. Notable examples include the fact that relevant actors have avoided delving into issues of *mens rea* when assessing the

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<sup>1323</sup> HLP Report (n 1100), 63 and 64.

<sup>1324</sup> HLP Report, *ibid*, 64.

<sup>1325</sup> Evans, 'From Humanitarian Intervention to the Responsibility to Protect' (n 1152), 707 and Gray (n 1153), 31-52.

<sup>1326</sup> Outcome Document (n 1058), para 139.

<sup>1327</sup> For e.g. UNGA, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities' (n 1220), art 8 (4).

criminal context of a particular situation, thereby helping to diminish the prospect of States arguing that secondary RtoP cannot be deemed to have been activated because it remains unclear whether all of the legal elements of an RtoP crime have emerged in a particular situation (i.e. the Rwanda problem<sup>1328</sup>). Formulating secondary RtoP's activation on the basis of a sliding scale helps reconcile the concerns of some States, most notably the US,<sup>1329</sup> that every act which falls within the scope of the mass atrocity crimes that RtoP covers can legitimately activate secondary RtoP. For example, that the recruitment or conscription of child soldiers can warrant the use of armed force against the State. Instead, secondary RtoP's activation may actually rest on a higher threshold than the substantiality test used in international criminal law, thereby suggesting that some of the acts which can fall within the legal reach of the crimes that RtoP covers will not necessarily fall within the reach of international action under secondary RtoP, particularly its non-peaceful component.

Notwithstanding the above steps, it seems unrealistic to expect that secondary RtoP's activation will always lead to its effective application. Whilst imminence is a workable concept elsewhere,<sup>1330</sup> some States<sup>1331</sup> arguments over whether RtoP crimes are actually imminent highlight its openness to subjectivity. In cases where international protective action is prejudicial to a States' national interests, claims that RtoP crimes are not imminent may be made in order to avoid activating the corresponding responsibility to protect for political reasons. Accordingly, there is also a risk that secondary RtoP's activation can be easily politicised. The interplay between secondary RtoP's activation and the legal elements of RtoP crimes may also create arguments over the way in which secondary RtoP requires political bodies, like the UNSC, to draw increasingly upon international law in their decision making processes.<sup>1332</sup>

Nevertheless, it is important to bear in mind that the difference between declaring a responsibility to act in particular circumstances and giving effect to that responsibility when those circumstances arise is not unique to the RtoP framework but, indeed, a general difficulty in practice. Furthermore, there is scope to suggest that there was no intention to formulate a definitive link between activation and application. The wider policy considerations taken into account by UNSC members when deciding whether to respond to Syria may have a bearing on the Outcome Document's provision for the UNSC to act on a

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<sup>1328</sup> On this debate, see e.g. Dallaire (n 1071), 343 and 374 and L van den Herik (n 1071), 76.

<sup>1329</sup> Statement of the Acting Representative of the United States to the UNGA, 'US Proposals for UN Reform' (n 1172) and Letter of the US Ambassador John Bolton to the UNGA President (n 1171).

<sup>1330</sup> HLP Report (n 1100), 63 and 64.

<sup>1331</sup> For examples of the varying ways in which States have contested the imminence of RtoP crimes and, therefore, secondary RtoP's activation, see e.g. Statements of the Representatives of *Cuba* and *Nicaragua* to the UNHRC in UN Press Release, 'UNHRC Debates Situation of Human Rights in Syrian Arab Republic' (n 1124) and Statements of the Representatives of the *Russian Federation* and *China* to the UNSC, UNSC Verbatim Record Security Council, 'The Situation in the Middle East' (4 October 2011) UN Doc S/PV.6627.

<sup>1332</sup> Statement of the Representative of *India* to the UNSC, UNSC Verbatim Record (30 March 2011) UN Doc S/PV.6508.

‘case-by-case basis’.<sup>1333</sup> Arguably, this phrase may mean that it is wholly legitimate to not simply determine secondary RtoP’s activation (and application) on the basis of the harm to the population but, instead, on a whole host of other policy considerations which the Outcome Document does not refer to (e.g. encouraging a civil war, violating the principle of non-interference). Whilst this undermines secondary RtoP’s capacity to standardise decision-making on when the UNSC should authorise the application of Chapter VII enforcement measures, it also avoids impacting on the UNSC’s existing discretion on this matter and may have therefore helped to gain the P5’s acceptance of secondary RtoP in 2005.<sup>1334</sup>

In conclusion, this chapter has highlighted that secondary RtoP’s activation is relatively fluid, segregating the specific tipping points for the activation of assistance, peaceful and non-peaceful responsive measures. However, the wide array of policy considerations that can arise regarding secondary RtoP’s application can influence the approaches taken to its activation in a particular case. In addition, secondary RtoP’s activation raises some significant questions regarding the scope of the measures which can be used when its activation and application *are* effective. Are any mechanisms in place in order to determine the prospect for RtoP crimes to arise in a State *before* we reach the stage where these crimes are imminently apprehended and decisions turn to whether secondary RtoP’s assistance, peaceful or non-peaceful responsive components have been activated? Which actors should provide consent to the provision of international assistance measures? What forms of assistance can be given? What steps, if any, can be taken if consent is not immediately forthcoming? In what way should we understand “peaceful” responsive measures? Does practice suggest that decision making on the use of armed force should meet any requirements other than that RtoP crimes be imminent? These and other equally important questions are addressed in the next chapter.

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<sup>1333</sup> Outcome Document (n 1058), para 139.

<sup>1334</sup> See e.g. Statement of the Representative of the *Russian Federation* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statement of the Representative of *China* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 and Letter of the US Ambassador John Bolton to the UNGA President (n 1171).



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**Old Policies, New Package?**

The Scope, Viability and Value Added  
of the “Responsibility to Protect”

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LLB (hons)

Submitted to Swansea University in Fulfilment  
of the Requirements for the Degree of Doctor of Philosophy

**Volume II**

**2013**



## CHAPTER V

### SECONDARY RtoP: STATUS NOVUS OR STATUS QUO?

#### Introduction

The Outcome Document provides that the international community<sup>1335</sup> can discharge secondary RtoP by (i) helping,<sup>1336</sup> encouraging<sup>1337</sup> and/or assisting<sup>1338</sup> States to protect their populations from RtoP crimes; (ii) using appropriate peaceful means to ‘help’<sup>1339</sup> achieve this protection;<sup>1340</sup> and (iii) using ‘collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate’.<sup>1341</sup> In his 2009 Report on Implementing RtoP, the UN Secretary-General [UNSG] interprets these provisions to contour secondary RtoP as entailing two “pillars”,<sup>1342</sup> specifically (i) the International Assistance and Capacity Building Pillar,<sup>1343</sup> and (ii) the Timely and Decisive Response Pillar.<sup>1344</sup> At the 2009 UNGA thematic debate on RtoP’s implementation, the overwhelming majority of States<sup>1345</sup> affirmed this two-pillar formulation of secondary RtoP. In 2010,<sup>1346</sup> the UNSG developed upon his earlier recommendations<sup>1347</sup> regarding States’ fulfilment of their additional Outcome Document commitments to support the UN’s establishment of an early warning capacity for RtoP crimes<sup>1348</sup> and Office of the Special

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<sup>1335</sup> As discussed in chapter two, the concept of the “international community” under secondary RtoP is heterogeneous, capable of being discharged to varying extents and different stages by a wide range of actors (e.g. third States, regional/sub-regional organisations and international organisations).

<sup>1336</sup> UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 138. (Outcome Document).

<sup>1337</sup> *ibid.*

<sup>1338</sup> *ibid.*, para 139.

<sup>1339</sup> *ibid.*

<sup>1340</sup> *ibid.* [‘The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity’].

<sup>1341</sup> *ibid.*

<sup>1342</sup> Report of the UNSG, ‘Implementing the Responsibility to Protect’ (12 January 2009) UN Doc A/63/677, 7-10. (UNSG 2009 Report, Implementing RtoP).

<sup>1343</sup> UNSG 2009 Report, Implementing RtoP, *ibid.*, 15-22.

<sup>1344</sup> *ibid.*, 22-28.

<sup>1345</sup> This was affirmed by States from across the geopolitical spectrum. See for e.g. Statements of the Representatives of Sweden (*on behalf of the European Union*), Indonesia, France, Guatemala, the United States, Australia and the Joint Statement of the Representatives of Costa Rica and Denmark to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 and Statements of the Representatives of Austria, Algeria, Singapore, Chile, Colombia and South Africa to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

<sup>1346</sup> Report of the UN Secretary-General, ‘Early Warning, Assessment and the Responsibility to Protect’ (14 July 2010) UN Doc A/64/864. (UNSG 2010 Report, Early Warning and Assessment).

<sup>1347</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 29 [discussing the need to “bolster” the Office of the SAPG with regard to its role and contribution to preventing RtoP crimes] and 31-33 [discussing preliminary proposals for a Joint Office to serve in the UN Secretariat as an early warning and assessment mechanism for RtoP crimes].

<sup>1348</sup> Outcome Document (n 1336), para 138.

Adviser on the Prevention of Genocide [SAPG].<sup>1349</sup>

This chapter examines the scope of secondary RtoP's early warning, assistance and responsive components in light of relevant practice which, notably, entails a similar character to primary RtoP practice. Whilst one layer outlines the general aspects of discharging secondary RtoP's components, another layer of practice develops this by defining the more intricate elements of the discharge process.

The chapter proceeds in three parts. Part one outlines that the UNSG construes the early warning system as *a means of discharging* secondary RtoP, not merely as that which will sometimes inform secondary RtoP's *activation*. To this effect, the UNSG has explained that 'identification and assessment'<sup>1350</sup> of RtoP cases are a crucial 'stage of the implementation process',<sup>1351</sup> particularly to secondary RtoP's preventive dimension and fulfilment of the Outcome Document commitment to assist States 'before crises and conflicts break out'.<sup>1352</sup> This underscores why this system is reviewed in depth as part of a discussion of secondary RtoP's scope rather than in the preceding chapter's analysis of secondary RtoP's activation. The chapter evaluates whether the system *adds value* to existing early warning systems, including those in a minority protection context.

Part two considers secondary RtoP's *International Assistance and Capacity Building Pillar*, including the character, nature and types of assistance measures. This includes significant issues, such as (i) the character of assistance measures; (ii) to whom assistance should be provided; (iii) the nature of international assistance measures; and (iv) the types of assistance means which can be used.

Part three examines secondary RtoP's *Timely and Decisive Response Pillar*. Drawing upon themes in relevant practice, the chapter explores whether the meaning of "peaceful" is settled among States and the varying utility of peaceful measures within the RtoP framework. Consideration then turns to fundamental issues surrounding secondary RtoP's non-peaceful responsive component. For example, does the use of armed force in RtoP cases require prior UNSC authorisation? What factors have informed international decision making on the use of non-peaceful measures in practice to date? What routes, if any, can be taken when the UNSC fails to undertake a "timely and decisive"<sup>1353</sup> response to protect populations from RtoP crimes?

The *interplay* between secondary RtoP and existing mechanisms is an overarching theme in the chapter. Particular emphasis is placed on whether secondary RtoP represent value added to (i) existing obligations, not least the UN Charter; and (ii) wider practice, such as

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<sup>1349</sup> *ibid*, para 139.

<sup>1350</sup> Report of the UNSG, 'Responsibility to Protect: Timely and Decisive Response' (25 July 2012) UN Doc A/66/874 – S/2012/578, 14. (UNSG Report 2012, 'Timely and Decisive Response').

<sup>1351</sup> UNSG Report, *ibid*.

<sup>1352</sup> Outcome Document (n 1336), para 139 and UNSG 2010 Report, Early Warning and Assessment (n 1346), 2.

<sup>1353</sup> Outcome Document, *ibid*.

humanitarian intervention. Does secondary RtoP exceed the *scope* of humanitarian intervention? Is secondary RtoP's discharge pursuant to the *non-incremental* approach through Chapter VII measures can be applied? Secondary RtoP's capacity to *impact* upon wider principles is also considered, including its relationship with the principle of neutrality in civil wars. Throughout, consideration is given to the extent to which secondary RtoP contributes to minorities' protection and, furthermore, the specific implications which present approaches to secondary RtoP may have in RtoP cases involving minorities.

Throughout, particular attention is given to aspects of secondary RtoP which, although significant at a practical and policy level, receive limited attention by policymakers, particularly in the UNSG's annual RtoP Reports. This includes the important issues of *to whom* assistance should be provided and whether regime change can be anything but an inevitable outcome of secondary RtoP's discharge when, as in cases like Libya and Syria, RtoP crimes are being *perpetrated by a State's national authorities*.

## 1 Early Warning and Assessment

In 2010 the Joint Office of the Secretary-General's Special Advisers on the Prevention of Genocide and RtoP was authorised to act as an instrument of early warning and assessment of RtoP crimes.<sup>1354</sup> The Office is mandated to monitor States for indications that RtoP crimes could be emerging. When 'crimes and violations relating to'<sup>1355</sup> RtoP appear imminent, the Office can issue an early warning to the international community. This writer is concerned with the sources of information regarding RtoP crimes that the Office can use and whether the Office represents value added to existing early warning systems.

### 1.1 Sources of Information: A Double-Edge Sword?

The Office can receive and interpret intelligence about the possibility of RtoP crimes emerging from a wide variety of sources.<sup>1356</sup> Significantly, the governments of third States are identified as particularly valuable sources of information.<sup>1357</sup> Arguably, even partly

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<sup>1354</sup> For details of the establishment of the Joint Office see generally UNSG 2010 Report, Early Warning and Assessment (n 1346). See further, State voting records on the funding for additional staff to serve in this Office in Annexes III-V, UN Press Release, 'Harmonising Staff Working Conditions, Strengthening UN Information Technology Among Issues, As Budget Committee Approves 18 Texts, Concludes Session' (23 December 2010) UN Doc GA/AB/3980 <<http://www.un.org/News/Press/docs/2010/gaab3980.doc.htm>> accessed 24 October 2011.

<sup>1355</sup> UNSG 2010 Report, Early Warning and Assessment, *ibid*, 2.

<sup>1356</sup> *ibid*, 5.

<sup>1357</sup> *ibid*.

relying on intelligence provided by national governments could be a *double-edge sword*.

On the one hand, the variability of national intelligence capacities could lead the Office to disproportionately depend on intelligence provided by the most *developed States*.<sup>1358</sup> The ICISS cautioned against this, stating that ‘one should not over-estimate the intelligence gathering and analytical capacities of major powers, particularly in parts of the world where they no longer perceive strategic interests’.<sup>1359</sup> This suggests that we should approach particularly developed States’ national intelligence capacities cautiously because their preoccupation with national security interests<sup>1360</sup> may mean that they do not provide adequate information about potential RtoP situations. At the very least, this could delay secondary RtoP’s discharge.

Providing for national governments’ input can also compound concerns about the politicisation of the early warning system. Examination of State views suggests that a particular concern is that information providers will inadvertently lead the Office to inspect events in some States and overlook others.<sup>1361</sup> Pakistan is a good illustration of States’ fears about politicisation and selectivity infiltrating the system. Pakistan argued that the system’s effectiveness largely depended on its capacity to overcome the:

‘[H]istorical trust deficit both in the form of experience of colonialism and unresolved historical disputes. While no warning or assessment is required in the case of internationally recognised disputes, the world and the UN system has consistently failed to address this issue’.<sup>1362</sup>

We should offset the potential implications noted by Pakistan against recent developments. The US is often given as an example of States whose domestic intelligence agencies

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<sup>1358</sup> *ibid*, 2.

<sup>1359</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, Ottawa 2001) 35. (ICISS Report).

<sup>1360</sup> Weiss makes a similar observation. He alludes to the possibility that RtoP’s early warning system could be compromised by relying upon the national security capacities of a handful of States. He argues that some States could prioritise national security interests, such as the prevention of terrorism, so far above those related to RtoP that, ultimately, RtoP concerns could become obsolete. N S MacFarlane, C J Thielking and T G Weiss, ‘The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?’ (2004) 25 (5) *Third World Quarterly* 977, 981. Grono makes a similar observation. He suggests that one reason that the United States did not push for more decisive action against Sudan concerning Darfur is because the Sudanese authorities have become a major ally to the United States in their war on terror. N Grono, ‘Briefing - Darfur: The International Community’s Failure to Protect’ (2006) 105 (421) *African Affairs* 621, 628. Alvarez has also noted that presently States such as the US perceive the greatest threat to its populations as terrorism. J E Alvarez, ‘The Schizophrenias of RtoP’ (Panel presentation at the ‘Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference’, The Hague, 30 June 2007).

<sup>1361</sup> Statements of the Representatives of *Pakistan*, the *Netherlands* and the *Solomon Islands* to the UNGA, ‘UNGA Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 6 January 2012.

<sup>1362</sup> Statement of the Representative of *Pakistan*, *ibid*. For a review of the kind of factors which underscore the lack of trust in the UN, see R Zuber and A C B Laso, ‘Trust but Verify: Building Cultures of Support for the Responsibility to Protect Norm’ (2011) 3 (3) *GRtoP* 286, particularly 290-293.



concentrate on national security threats.<sup>1363</sup> However, the US recently established a national early warning and assessment system which focuses specifically on the mass atrocity crimes to which RtoP relates.<sup>1364</sup> Significantly, the Senate Resolution which established the system explicitly referred to the Outcome Document's RtoP provisions.<sup>1365</sup> This raises the possibility that RtoP's consensus adoption has helped to close the gap between the protection of national and human security, at least in one developed State.<sup>1366</sup>

On the other hand, there is the risk that some States could manipulate their intelligence in order to encourage or discourage secondary RtoP's activation in accordance with their own political agenda. Relevant practice suggests that this risk could be particularly strong when intelligence is given by governments who are either (i) geographical neighbours of the State at issue; or (ii) who have a kinship tie to a particular group(s) in the State at issue. Indeed, minority protection research observes that international assessment of a particular State may be exploited by neighbouring or Kin States in order to publicise and gain international support for the situation inside the State.<sup>1367</sup> Relevant RtoP practice sustains this risk.

Syria can be drawn upon with respect to geographically neighbouring States. Syria suggests that neighbouring States can be a useful source of information regarding RtoP crimes and tool for exerting diplomatic pressure against a State to protect its population. For example, Turkey hosts several thousand Syrian refugees, permitted the appointment of a Syrian National Council Office in its territory, attached economic sanctions against the regime and declared its commitment to take further measures in order to help protect the

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<sup>1363</sup> See for instance, MacFarlane, Thielking and Weiss (n 1360), 983-985.

<sup>1364</sup> On this see generally, United States Senate Concurrent Resolution (11th Congress, 2nd Session, 2010) Res DAV10643; White House Office of the Press Secretary, 'Creation of an Interagency Atrocities Prevention Board and Corresponding Interagency Review' (4 August 2011) Presidential Study Directive PSD-10; International Coalition for the Responsibility to Protect, 'US Senate Resolution on Preventing Genocide and Mass Atrocities' (5 August 2010) <<http://www.responsibilitytoprotect.org/index.php/component/content/article/134-americas/2912-us-senate-resolution-dav10643-on-preventing-genocide-and-mass-atrocities>> accessed 14 July 2012 and J Claes, 'Obama Announces Formation of the Atrocities Prevention Board' (United States Institute of Peace, 23 April 2012) <<http://www.usip.org/publications/obama-announces-formation-the-atrocities-prevention-board>> accessed 14 July 2012.

<sup>1365</sup> 'Whereas, in 2005, the United States and all other members of the United Nations agreed that the international community has "a responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapter VI and VIII of the United Nations Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity," and to take direct action if national authorities are unwilling or unable to protect their populations'. US Senate Resolution 2010, *ibid*, preambular para 3.

<sup>1366</sup> This imbalance is considered to have arisen as a result of 9/11. On the way in which the events of 9/11 impacted upon the United States and other States commitment to protecting populations from mass atrocity crimes, see generally MacFarlane, Thielking and Weiss (n 1360). The ICISS Report, published in the immediate aftermath of 9/11, acknowledged the way in which the event could shift States attentions (i) from the policy tension that arose in the Kosovo case (the need to protect another State's populations from mass atrocity crimes perpetrated by its national authorities); (ii) to protecting their own populations from terrorist attacks. To this effect, ICISS noted that '[a]t least until the horrifying events of 11 September 2001 brought to centre stage the international response to terrorism, the issue of intervention for human protection purposes has been seen as one of the most controversial and difficult of all international relations questions'. ICISS Report (n 1359) vii and ix.

<sup>1367</sup> On this issue, see particularly L Thio, 'Developing a "Peace and Security" Approach Towards Minorities' Problems' (2003) 52 (1) ICLQ 115, 124-25.

population from the regime.<sup>1368</sup> However, Syria equally highlights that neighbouring States can sometimes downplay the seriousness of the situation inside the State because they want to *avoid* secondary RtoP's activation against a regime with whom they have close ties. Lebanon is a primary example. Lebanon abstained from the October 2011 vote regarding the adoption of a draft UNSC Resolution on Syria, because it wanted to 'defend that brotherly Arab country and its right to sovereignty and the integrity of its people and land, including the right to ensure the security and safety of all its citizens'.<sup>1369</sup>

In terms of Kin States, the Russia-Georgia conflict suggests that some governments could manipulate the information they give in order to justify their use of armed force against a State which threatens consolidating its influence in the region.<sup>1370</sup> Kin States' potential abuse of the early warning system is overlooked by Kemp and Popovski.<sup>1371</sup> Both note that some States will resist the system in order to 'avoid [...] scrutiny'<sup>1372</sup> of their internal affairs by external actors. They do not apply similar political realism to their analysis of the sources of information used by the system, however. Instead, both commend the 'two-way exchange of information'<sup>1373</sup> under the system, setting aside the way in which this could encourage Kin States to manipulate information in order to increase their level of interference in the affairs of the third State in which the minority group resides.

## 1.2 Scope of the System: Value Added or Doubling-Up?

The Office's *specific focus* on RtoP crimes may represent value added to existing early warning systems, including those in a minority protection context. The SAPG's<sup>1374</sup> early

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<sup>1368</sup> On Turkey's role in relation to the situation in Syria, see International Coalition of the Responsibility to Protect, 'Crisis in Syria' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria>> accessed 12 August 2012. For a persuasive argument with respect to the way in which neighbouring States could take a more prominent role in relation to Syria, not least that of Turkey, see generally A M Slaughter, 'How to Halt the Butchery in Syria' *The New York Times* (New York, 23 February 2012) <[http://www.nytimes.com/2012/02/24/opinion/how-to-halt-the-butchery-in-syria.html?\\_r=1](http://www.nytimes.com/2012/02/24/opinion/how-to-halt-the-butchery-in-syria.html?_r=1)> Last accessed 12 July 2012.

<sup>1369</sup> Statement of the Representative of *Lebanon* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627. For a useful history of the relationship between Lebanon and Syria from the perspective of the Kin State's role in discharging secondary RtoP, see particularly J Castellino, "RtoP and Kinship in the Context of Syria and Lebanon" in W Kemp, V Popovski and R Thakur (eds), *Blood and Borders: The Responsibility to Protect and the Problem of the Kin-State* (UN University Press, Tokyo 2011) 122-143.

<sup>1370</sup> The possible manipulation of a situation by a Kin State and its possible impact on the RtoP framework at a doctrinal and policy level have been discussed at various junctures throughout the thesis, particularly from the perspective of the Russia-Georgia conflict. See chapters one, two and four.

<sup>1371</sup> V Popovski and W Kemp, "The Role of the Kin State in Minority Protection" in Kemp, Popovski and Thakur (n 1369) 231-239.

<sup>1372</sup> *ibid*, 239 (ellipsis added).

<sup>1373</sup> *ibid*, 239.

<sup>1374</sup> On the early warning and assessment function of the Special Adviser on the Prevention of Genocide, see particularly L Woocher, 'Developing a Strategy, Methods and Tools for Genocide Early Warning' (Report prepared for the Office of the Special Adviser to the UN Secretary-General on the Prevention of Genocide, September 2006) <[www.un.org/en/preventgenocide/adviser/pdf/Woocher%20Early%20warning%20report,%202006-11-10.pdf](http://www.un.org/en/preventgenocide/adviser/pdf/Woocher%20Early%20warning%20report,%202006-11-10.pdf)> accessed 10 August 2012.

warning role in a minority protection context has been criticised for prioritising indicators of genocide.<sup>1375</sup> Similarly, the UN Independent Expert on Minority Rights recommended the establishment of an early warning system which can ‘highlight patterns of extreme violence or social exclusion aimed at or affecting minority communities’.<sup>1376</sup> In short, a system which could alert the international community to potentially impending atrocities before (i) the specific elements of the crime of genocide became sufficiently apparent to engage the SAPG’s mandate; or (ii) the signs of a potential ethnic conflict in a European State engaged the OSCE High Commissioner for National Minorities’ mandate.<sup>1377</sup> The SAPG’s mandate was extended in 2007 to cover ‘other mass atrocities’.<sup>1378</sup> However, some States<sup>1379</sup> consider that there remains a tendency to focus on genocide.

The present author considers that practice to date suggests that RtoP’s early warning system may overcome the drawbacks of existing systems. In their joint statements on RtoP situations, the SAPG and Special Adviser on RtoP pay equal attention to the different crimes which RtoP covers. For example, reference has so far been made to the possibility of (i) ethnic cleansing emerging in Kyrgyzstan,<sup>1380</sup> and (ii) crimes against humanity emerging in cases like Abyei,<sup>1381</sup> Libya<sup>1382</sup> and Syria.<sup>1383</sup> Arguably, this is because the specification that

<sup>1375</sup> Srinivasan’s assessment of the role of the Special Adviser in Darfur is a good example of this criticism. She argues that whilst the genocide focus of the SAPG ‘may usefully contribute to’ prompting Early Warning’s of other atrocity crimes, the role does not itself ‘assume a broader integrated early warning function’. S Srinivasan, *Minority Rights, Early Warning and Conflict Prevention: Lessons from Darfur* (Minority Rights Group International, London 2006) 8. See also criticisms regarding the lack of follow-up powers of the Special Adviser on the Prevention of Genocide by, for example, H Nasic, ‘Minority Rights Instruments and Mechanisms: Minority Protection Along the Conflict Continuum’ (2007) EURAC Research, European Academy, 75; A Brown, ‘Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?’ (2008) House of Commons Research Paper 08/55, 32, fn 75. See the detailed analysis framework used by the Special Adviser when assessing States for indicators of the specific crime of genocide, Office of the Special Adviser of the Secretary-General on the Prevention of Genocide, ‘Office of the UN Special Adviser on the Prevention of Genocide: Analysis Framework’ <[http://www.un.org/en/preventgenocide/adviser/engagement\\_partners.shtml](http://www.un.org/en/preventgenocide/adviser/engagement_partners.shtml)> accessed 10 October 2012.

<sup>1376</sup> UN Human Rights Commission, ‘Specific Groups and Individuals: Minorities. Report of the Independent Expert on Minority Issues’ (6 January 2006) UN Doc E/CN.4/2006/74, 18.

<sup>1377</sup> On the mandate of the OSCE High Commissioner for National Minorities, see especially CSCE, ‘CSCE 1992 Summit: The Challenges of Change’ (Helsinki, 9-10 July 1992) Section II. See also UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, ‘Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities’ (10 August 1993) UN Doc E/CN.4/Sub.2/1993/34, 71 (UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities); Thio (n 1367), 117-128 and G Pentassuglia, ‘Minority Rights, Human Rights: A Review of Basic Concepts, Entitlements and Implementation Procedures under International Law’ in M Weller and A Morowa (eds), *Mechanisms for the Implementation of Minority Rights* (Council of Europe Press, Strasbourg 2005) 23.

<sup>1378</sup> On this extension, see Letter from the UNSG to the President of the UNSC (7 December 2007) UN Doc S/2007/721 (Letter from the UNSG to the UNSC President 2007). See also UNHRC, ‘Report of the Secretary-General on the implementation of the Five Point Action Plan and the activities of the Special Adviser on the Prevention of Genocide’ (2008) UN Doc A/HRC/7/37.

<sup>1379</sup> Letter from the UNSG to the UNSC President 2007, *ibid*.

<sup>1380</sup> UN Press Release, ‘UN Secretary-General’s Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan’ (15 June 2010)

<<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 27 July 2012.

<sup>1381</sup> UN Press Release, ‘UN Secretary-General’s Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in the Abyei Region of Sudan’ (16 March 2011)

<<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 27 July 2012.

<sup>1382</sup> UN Press Release, ‘UN Secretary-General’s Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Libya’ (22 February 2011)

RtoP covers genocide, war crimes, crimes against humanity and ethnic cleansing makes the exact crimes that should be considered as ‘other mass atrocities’<sup>1384</sup> more explicit. Accordingly, there is scope to argue that value added may arise from the specificity of RtoP’s early warning system.

## 2 International Assistance and Capacity Building

Examination of relevant practice suggests that international assistance can be provided through a wide range of means, ranging from technical human rights assistance<sup>1385</sup> to the deployment of peacekeepers.<sup>1386</sup> Furthermore, there is now a general consensus that international assistance should be provided with the consent of the relevant authorities of the intended recipient State.<sup>1387</sup>

Relevant practice has helped to contour the approaches which may be adopted to the finer elements of the international assistance process, including (i) the general character of secondary RtoP assistance measures; (ii) to whom assistance may be provided; (iii) what steps can be taken to ensure the provision of assistance when the consent of relevant actors’ is not forthcoming; and (iv) the factors which should be taken into consideration in decisions regarding the form(s) of assistance which should be provided in a particular case.

### 2.1 The Character of Assistance: Structural vs. Operational Measures

The preceding chapter argued that basing secondary RtoP’s activation on an imminence threshold suggests that secondary RtoP entails a preventive component. It is therefore unsurprising that secondary RtoP’s assistance measures largely consist of prevention

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<<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 27 July 2012. (UNSG’s Special Adviser’s Statement on the Situation in Libya 2011).

<sup>1383</sup> UN Press Release, ‘Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, Urge Immediate Action to End Violence in Syria’ (10 February 2012); UN Press Release, ‘Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria’ (21 July 2011); UN Press Release, ‘Marking a Full Year of Violent Suppression of Anti-Government Protests in Syria, the United Nations Secretary-General’s Special Advisers on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, Release the Following Statement’ (15 March 2012) and UN Press Release, ‘Statement of the Special Advisers of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Syria’ (14 June 2012). All statements available at: <http://www.un.org/en/preventgenocide/adviser/statements.shtml>. Last accessed 27 July 2012.

<sup>1384</sup> Letter from the UNSG to the UNSC President 2007 (n 1378).

<sup>1385</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 16-17.

<sup>1386</sup> *ibid.*, 18.

<sup>1387</sup> See e.g. *ibid.*, 18; UNHRC, ‘Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance’ (30 March 2010) UN Doc A/HRC/14/43, 18; UNHRC, ‘Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githa Muigai’ (30 March 2010) UN Doc A/HRC/14/43, 18; International Law Commission, ‘Protection of Persons in the Event of Disasters’ (22 July 2009) UN Doc A/CN.4/SR.3019, 3.

strategies. The character of the prevention strategies appears to have altered before and after the World Summit, however. Before the World Summit, the use of structural and operational prevention strategies were emphasised equally. The ICISS Report is a primary example, recommending the “responsibility to prevent” be discharged through (i) ‘direct’<sup>1388</sup> (operational<sup>1389</sup>) measures, such as the deployment of human rights monitors,<sup>1390</sup> and (ii) ‘root cause’<sup>1391</sup> (structural<sup>1392</sup>) measures, such as strengthening national legal provisions for minority rights.<sup>1393</sup> After the World Summit, relevant actors have suggested that secondary RtoP requires the use of both operational and structural prevention.<sup>1394</sup> However, structural measures have received limited support in practice. Recommendations to incorporate development assistance into existing development/rule of law programmes<sup>1395</sup> and to utilise the technical assistance provided by relevant human rights bodies<sup>1396</sup> are examples of the few structural prevention activities recommended in the Secretary-General’s Report which have some State support.<sup>1397</sup> Furthermore, case studies like the Côte d’Ivoire<sup>1398</sup> and Darfur<sup>1399</sup> highlight that, in practice, there remains a tendency to apply operational assistance measures.

Arguably, the shift toward focusing on operational assistance measures could be the

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<sup>1388</sup> ICISS Report (n 1359), 23-27.

<sup>1389</sup> “Operational” prevention activities have been defined as involving ‘early engagement to help create conditions in which responsible authorities can resolve tensions before they lead to violence’. Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict – Final Report* (Carnegie Commission on Preventing Deadly Conflict, Washington D.C.1997) at 69, cited in International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Research, Bibliography and Background* (International Development Research Centre, Ottawa 2001) 32. (ICISS, Research, Bibliography and Background).

<sup>1390</sup> ICISS Report (n 1359), 24.

<sup>1391</sup> *ibid*, 22-23.

<sup>1392</sup> Structural prevention activities are broadly understood as those which ‘address the root causes of deadly conflict’. Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict – Final Report* (Washington DC: Carnegie Commission on Preventing Deadly Conflict, 1997) 40 cited in ICISS, Research, Bibliography and Background (n 1389), 32.

<sup>1393</sup> ICISS Report (n 1359), 23.

<sup>1394</sup> Report of the UNSG, ‘The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect’ (2011) UN Doc A/59/744, 7; Statement of the OSCE High Commissioner on National Minorities to the UNGA, ‘Thematic Debate on The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect’ (July 2011) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 6 January 2012.

<sup>1395</sup> UNSG 2009 Report, Implementing RtoP (n 1342) 19-21.

<sup>1396</sup> *ibid*, 16-17.

<sup>1397</sup> See e.g. Statements of the Representatives of the *United Kingdom, Canada, Brazil, Uruguay, Malaysia, Mexico and Ecuador* to the UNGA, ‘Informal Debate on Early Warning, Assessment and the Responsibility to Protect’ (9 August 2010) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 6 January 2012.

<sup>1398</sup> Peacekeepers were already in the region when the situation became an “R2P case”. However, in response to the perpetration of RtoP crimes, the peacekeeping mandate was strengthened and troop numbers expanded. See for instance, UNSC Res 1962 (20 December 2010) UN Doc S/RES/1962, para 3 [renewing the mandate of the UNOCI mission].

<sup>1399</sup> On this deployment see UNSC Res 1706 (2006) UN Doc S/RES/1706 and UNSC Res 1769 (2007) UN Doc S/RES/1769. For a discussion of the deployment of peacekeepers to Darfur, see especially R Belloni, ‘The Tragedy of Darfur and the Limits of the ‘Responsibility to Protect’ (2006) 5 (4) *Ethno politics* 327 and M Clough, ‘Darfur - Whose Responsibility to Protect?’ in Human Rights Watch, *World Report 2005* (Human Rights Watch, United States 2005) 25-39 <<http://www.hrw.org/legacy/wr2k5/darfur/index.htm>> accessed 6 January 2012 and Grono (n 1360).

outcome of replacing the ICISS RtoP “continuum”<sup>1400</sup> with the “three pillar”<sup>1401</sup> approach. This shift changed the relationship between the State and the international community in preventing RtoP crimes. In the ICISS Report, prevention features as a distinct “responsibility”.<sup>1402</sup> Although, the Report states that the prevention of RtoP crimes is ‘first and foremost, the responsibility of sovereign States’,<sup>1403</sup> it does not clearly distinguish the preventive responsibilities of the State and international community. This general approach to prevention suggests that preventive activities involve some partnership or ongoing co-operation between the State and international community. The following paragraph on the use of legal means to prevent RtoP crimes is one example of the general approach to prevention adopted in the ICISS Report:

‘Root cause prevention may also mean strengthening *legal* protections and institutions. This might involve supporting efforts to strengthen the rule of law; protecting the integrity and independence of the judiciary; promoting honesty and accountability in law enforcement; enhancing protections for vulnerable groups, especially minorities; and providing support to local institutions and organizations working to advance human rights’.<sup>1404</sup>

The three-pillar approach outlined in the UNSG’s 2009 Report moves away from this general approach by providing that certain prevention activities fall under States’ primary RtoP duty (e.g. training the national judiciary in ‘human rights, international humanitarian law and refugee law’<sup>1405</sup>), whilst others can be undertaken by the international community under secondary RtoP’s international assistance component (e.g. the deployment of peacekeepers<sup>1406</sup>). Accordingly, it can be argued that there has not been a complete shift away from using structural prevention strategies to discharge RtoP following the World Summit. Instead, efforts to distinguish primary and secondary RtoP have resulted in a clearer allocation of structural and operational prevention strategies between the actors who will usually discharge them.

The abovementioned shift may also explain why the Outcome Document does not refer to the “responsibility to rebuild”.<sup>1407</sup> The ICISS Report provides that relevant actors should discharge operational and structural measures to help prevent RtoP crimes from re-emerging in States where RtoP crimes have been perpetrated.<sup>1408</sup> The reformulation of the RtoP framework at the World Summit enabled many of these measures to be divided between

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<sup>1400</sup> As per the ICISS Report (n 1359).

<sup>1401</sup> As per UNSG 2009 Report, Implementing RtoP (n 1342).

<sup>1402</sup> ICISS Report (n 1359), 19-27.

<sup>1403</sup> *ibid*, 19.

<sup>1404</sup> *ibid*, 23.

<sup>1405</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 11.

<sup>1406</sup> *ibid*, 18.

<sup>1407</sup> ICISS Report (n 1359), 39.

<sup>1408</sup> *ibid*, 39-45.

primary RtoP and secondary RtoP's assistance component in subsequent practice, thereby diminishing the need to maintain a distinct "responsibility to rebuild". For example, the UNSG's 2009 Report largely allocates (i) structural measures, such as institution building, to States' primary RtoP duty; and (ii) operational measures, such as '[p]ost-trauma peace building',<sup>1409</sup> to secondary RtoP's assistance component.

Has the shift in secondary RtoP's prevention strategies since the World Summit impacted on secondary RtoP's contribution to the protection of populations, including minorities? On the one hand, minority protection research strengthens the view that structural measures can help to prevent RtoP crimes. For example, grievances over natural resources among ethnic minority groups were central to the eruption of violence in Darfur and, by extension, the RtoP crimes committed there.<sup>1410</sup> Minority protection research also commends structural measures for providing 'opportunities to enhance protection of civilians by incorporating analysis and action that directly engages with minority concerns'.<sup>1411</sup>

Conversely, focusing upon operational measures can be important at a policy level. Primarily, delimiting assistance to measures which are relevant to cases in which a population has already sustained RtoP-type harm helps to reassure States that they will not be subject to international interference outside the context of RtoP-type harm against the population. This is significant because, although the assistance pillar is focused on equipping the State to better protect its population, "helping" and "encouraging" populations' protection suggests that the State may come under diplomatic pressure to cooperate and comply with the international community's offers of assistance. Two issues are relevant here.

First, it can be difficult to formulate a set of structural prevention mechanisms for *global acceptance* because States can be influenced by their varying cultural, social and economic positions. Whilst one group of States may favour focusing upon building democratic institutions and installing the rule of law, this can raise concerns among States who do not use democratic government models. In short, this approach could associate secondary RtoP with the external imposition of democracy and liberalism<sup>1412</sup> or, to borrow Chomsky's language, the "standards of the West".<sup>1413</sup> In contrast, another group of States may favour focusing upon development assistance. This can create concern among those States who, due

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<sup>1409</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 21.

<sup>1410</sup> See generally, Srinivasan (n 1375).

<sup>1411</sup> *ibid*, 8.

<sup>1412</sup> On the capacity for secondary RtoP to be seen to impose the values of certain States, see generally T McCormack, "The Responsibility to Protect and the End of the Western Century" in P Cunliffe (ed), *Critical Perspectives on the Responsibility to Protect* (Routledge, Abingdon 2011) 35-48 and D Chandler, "The Responsibility to Protect? Imposing the "Liberal Peace"" (2004) 11 (1) *International Peacekeeping* 59. On the concept of liberalism generally, see R Thakur, *The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics* (Routledge, Abingdon 2011) 24.

<sup>1413</sup> N Chomsky, *A New Generation Draws the Line: "Humanitarian" Intervention and the Standards of the West* (Pluto Press, London 2012).

to their economic position, consider that they will be looked upon to increase their development assistance to third States. This can risk secondary RtoP being interpreted as that which puts certain States under increased economic burden.<sup>1414</sup> Drawing upon the ICISS Report's handling of structural prevention measures, Oman<sup>1415</sup> persuasively explains the central policy concern which some States have over providing the international community a role in structural prevention initiatives. She writes:

'[T]he more nebulous root cause threats to human security identified by the Commission *do* involve profound issues of culturally relative standards of value, both with respect to the particular types of situations that should be regarded as requiring intervention and with respect to the limits on intervention itself'.<sup>1416</sup>

The present author finds Oman's view persuasive. It plausibly outlines the way in which States' competing cultural perspectives may underscore the development of globally acceptable structural measures. In so doing, the argument identifies a possible policy reason for why discharging secondary RtoP's assistance component through structural measures has only been explicitly endorsed by a handful of States. Furthermore, Oman's view may provide an explanation for why the UNSG's 2009 Report highlights that some international assistance measures can be particularly useful because of their cultural relativity. To this effect, the UNSG's 2009 Report encourages relevant actors to utilise regional assistance initiatives because they can more readily adapt to 'local conditions and cultures'.<sup>1417</sup> The potential impact of cultural concerns on the development of the character of secondary RtoP's assistance component may also underscore why RtoP commentators are increasingly considering how to accommodate culturally relative perspectives into the RtoP framework.<sup>1418</sup>

Second, focusing largely upon operational measures and limiting the few structural

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<sup>1414</sup> See e.g. the way in which economic concerns have influenced the divide in State views between a right to development and the adoption of a rights-based approach to development in P Uvin, 'From the Right to Development to the Rights-Based Approach: How Human Rights Entered Development' (2007) 17 (4/5) *Development in Practice* 597, 598-599.

<sup>1415</sup> N Oman, 'The 'Responsibility to Prevent': A Remit for Intervention?' (2009) 22 *Can. J. L. & Jurisprudence* 355.

<sup>1416</sup> *ibid.*, 365.

<sup>1417</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 16.

<sup>1418</sup> See generally R Mani and T G Weiss, *Responsibility to Protect: Cultural Perspectives in the Global South* (Routledge, Abingdon 2011) and R Mani and T G Weiss, 'RtoP's Missing Link, Culture' (2011) 3 *Global Responsibility to Protect* 451. See further, R Thakur, 'Responsibility to Protect is Universal' *The Daily Yomiuri* (17 November 2009) reprinted in R Thakur, *The People vs. The State: Reflections on UN Authority, US Power and the Responsibility to Protect* (UN University Press, Tokyo 2011) 209-211 and P Orchard, 'Review Article: The Evolution of the Responsibility to Protect: At a Crossroads?' (2012) 88 (2) *Int. Affairs* 377, 381-385 [discussing cultural perspectives from the viewpoint of secondary RtoP's responsive component, particularly accommodating the use of armed force to varying cultural perspectives]; D Capie, 'The Responsibility to Protect Norm in Southeast Asia: Framing, Resistance and the Localisation Myth' (2012) 25 (1) *Pacific Review* 75, 79-81 [discussing RtoP's 'localisation' in Asian States] and G Day and C Freeman, 'Operationalising the Responsibility to Protect - The Policekeeping Approach' (2005) 11 *Global Governance* 139, 141-142 [emphasising the importance of culturally relative perspectives in rule of law activities in territories recovering from RtoP crimes].



measures recommended to the mandates of existing bodies, like the Office of the High Commissioner for Human Rights,<sup>1419</sup> reinforce that secondary RtoP's assistance component should be discharged in a *collective and institutional* manner.<sup>1420</sup> The operational and (few) structural assistance measures recommended equally rely upon the coordination, expertise and resources of relevant international and regional organisations. For example, peacekeeping (operational)<sup>1421</sup> and technical human rights assistance (structural).<sup>1422</sup> This approach better guards against the potential impact that secondary RtoP may have upon present approaches to minority protection than earlier RtoP Reports did. If practice following the World Summit had reiterated the range of structural measures proposed in the ICISS Report, Kin States may have been able to more readily misuse secondary RtoP's assistance component. One example is the ICISS's proposal for preventive efforts to address 'political needs and deficiencies'<sup>1423</sup> in a State. A Kin State may have exploited this structural measure in order to add legitimacy to breaching wider minority protection provisions which prohibit Kin States' from 'financing political parties of an ethnic or religious character in a foreign country, as this may have destabilizing effects and undermine good inter-State relations'.<sup>1424</sup> Whilst the ICISS advised that structural prevention efforts, including those of a political nature, should be undertaken with respect to friendly relations and minority protection principles,<sup>1425</sup> we can question whether such advice would have been sufficiently guarded against secondary RtoP's assistance Pillar being misused in this way by Kin States. This is because the provision of similar advice in a minority protection context has not prevented Kin States from taking actions which violate the principle of friendly relations and the need for the host State's consent to confer benefits upon a minority group.<sup>1426</sup> A good example can be found in RtoP practice to date. The requirement for Kin States to refrain from conferring citizenship 'en masse'<sup>1427</sup> did not prevent Russia from conferring Russian citizenship upon residents of South Ossetia without Georgia's consent.<sup>1428</sup> Notably, this occurred immediately prior to Russia's use of armed force against Georgia under the pretext of discharging

<sup>1419</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 16.

<sup>1420</sup> This was discussed in detail in chapter two with regard to State views on the meaning which is to be given to the "international community" as the secondary RtoP bearer.

<sup>1421</sup> Or, as the UN Secretary-General refers to this, "preventive deployment" and "international military assistance". UNSG 2009 Report, Implementing RtoP (n 1342), 18-19.

<sup>1422</sup> *ibid*, 16.

<sup>1423</sup> ICISS Report (n 1359), 23.

<sup>1424</sup> 'States may provide support to cultural, religious or other non-governmental organisations respecting the laws and with explicit or implied consent of the country in which they are registered or operating. However, States should refrain from financing political parties of an ethnic or religious character in a foreign country, as this may have destabilizing effects and undermine good inter-State relations'. OSCE High Commissioner for National Minorities, *The Bolzano/Bozen Recommendations on National Minorities and Inter-State Relations and Explanatory Note* (OSCE HCNM, The Hague 2008) 7. (OSCE HCNM, Bolzano/Bozen Recommendations).

<sup>1425</sup> ICISS Report (n 1359), 22-23 [outlining the way in which preventive strategies should operate].

<sup>1426</sup> On these requirements, see e.g. OSCE HCNM, Bolzano/Bozen Recommendations (n 1424), 6-7.

<sup>1427</sup> *ibid*, 6-7.

<sup>1428</sup> On this see Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (28 August 2008) UN Doc S/PV.5969.

RtoP.<sup>1429</sup> Admittedly, the Outcome Document may have tried to circumvent this risk by explicitly providing for international assistance to be provided to “States”,<sup>1430</sup> not wider aspects of the population like ‘political parties’.<sup>1431</sup> However, chapter two noted that practice suggests that there can be cases where the “State” is interpreted in competing ways, not least in secessionist enclaves like South Ossetia. This writer would therefore argue that focusing by and large upon operational measures can act as a further safeguard against Kin States invoking secondary RtoP’s assistance component to violate principles of territorial integrity, friendly relations and non-interference, not least because present guidance clearly requires that relevant global organisations/institutions lead the discharge of these measures.

This need not undermine the way in which secondary RtoP’s discharge can be tailored toward addressing the specific concerns of minority groups themselves, rather than via the State. Indeed, secondary RtoP does provide some outlets for engaging with the specific concerns of minorities. For example, the early warning system for RtoP crimes envisages a role for local actors which, presumably, would include minorities.<sup>1432</sup> Furthermore, the alternative view advanced in minority protection research is that structural prevention is already carried out under existing mechanisms, such as UN Human Rights treaty bodies.<sup>1433</sup> There is therefore scope to argue that secondary RtoP does not need to embrace structural prevention strategies to ensure that it can be effective in the protection of populations, including minorities, because existing international mechanisms like UN Human Rights treaty bodies and the Peacebuilding Commission [PBC] already carry out this task. In this line, it is important to recall that the Outcome Document commits the international community to providing assistance to help States build the requisite capacity to protect their populations from RtoP crimes ‘before crises and conflicts break out’.<sup>1434</sup> Although no relevant actor has, to date, explicitly justified the provision of assistance measures in advance of ‘crises and conflicts’<sup>1435</sup> emerging, this does not necessarily mean that the commitment has not been discharged whatsoever. The UNSG connects this commitment to RtoP’s early warning and assessment system and, therefore, to action carried out before RtoP

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<sup>1429</sup> *ibid.*

<sup>1430</sup> Outcome Document (n 1336), para 138 [‘The international community should, as appropriate, encourage and help States to exercise this responsibility’, emphasis added].

<sup>1431</sup> OSCE HCNM, Bolzano/Bozen Recommendations (n 1424), 7.

<sup>1432</sup> ‘United Nations decision-making concerning the responsibility to protect should be informed and enriched, whenever possible, by local knowledge and perspectives, as well as by the input of regional and sub-regional organizations’. UNSG 2010 Report, Early Warning and Assessment (n 1346), 4.

<sup>1433</sup> See Nasic, ‘Minority Rights Instruments and Mechanisms’ (n 1375). See also UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (n 1377) 71 [highlighting the way in which treaty bodies provide an effective Early Warning function].

<sup>1434</sup> Outcome Document (n 1336), para 139.

<sup>1435</sup> *ibid.*



crimes occur.<sup>1436</sup> Thus, it may simply be that structural assistance steps have been justified by reference to the discharge of existing mechanisms, as opposed to explaining that existing structural prevention initiatives have been discharged in order to fulfil the aforementioned Outcome Document commitment.<sup>1437</sup>

### 2.1.1 Present Literature

The character of prevention (assistance) measures has been the subject of debate among commentators. Essentially two views on the issue are taken. The first view is that secondary RtoP could be more effective at preventing RtoP crimes if it prioritised structural measures, such as development assistance. For example, Sarkin<sup>1438</sup> considers that prevention strategies should focus on socio economic rights to ensure that social and economic inequalities within a State do not trigger RtoP crimes.<sup>1439</sup> Others<sup>1440</sup> suggest focusing on structural prevention in order to avoid assistance becoming ‘militaristic’<sup>1441</sup> which they consider would make secondary RtoP’s prevention strategies too ‘reactive’,<sup>1442</sup> coming into effect only after there has been some civil unrest or violence within a State. On the one hand, the present writer considers that this is a persuasive argument. Operational prevention measures will usually involve discharging secondary RtoP after the population has sustained harm and they can therefore be considered as more “reactive”<sup>1443</sup> than structural prevention strategies which target the factors which could trigger RtoP crimes in the future.

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<sup>1436</sup> UNSG 2010 Report, Early Warning and Assessment (n 1346), 2. [‘The implementation of preventive measures “before crises and conflicts break out” and the identification of which States “are under stress” necessarily entail timely early warning and impartial assessment by the United Nations’].

<sup>1437</sup> As Luck explains, just because States have not expressly attached the RtoP-label to protective actions does not necessarily mean that the actions were not undertaken for RtoP purposes. This may be because a number of the means of discharging the framework are already available under existing mechanisms. E C Luck, ‘The Normative Journey: The Evolution of the RtoP Concept’ (Keynote address, European Science Foundation Conference ‘The Responsibility to Protect from Principle to Practice’ Linköping, June 2010).

<sup>1438</sup> J Sarkin, ‘The Role of the United Nations, the African Union and Africa’s Sub-Regional Organisations in Dealing with Africa’s Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect’ (2009) 53 (1) *Journal of African Law* 1, 12. See also Volk who argues that the responsibility could be more effective if the ‘militarisation of foreign assistance’ was replaced with a focus on development assistance to prevent RtoP crimes and conflict. J Volk and S Stedjan, ‘Building Structures for Peace: A Quaker Lobby Offers Strategies for Peacemakers’ in R Cooper and J Kohler (eds.) *Responsibility to Protect: The Global Moral Compact for the 21st Century* (Palgrave Macmillan, New York 2009) 199-218.

<sup>1439</sup> Sarkin, *ibid*, 12. See further, J Sarkin, ‘Is the Responsibility to Protect an Accepted Norm of International Law in the Post-Libya Era? How its Third Pillar Ought to Be Applied’ (2012) 1 *Groningen Journal of International Law* 11, 26-27 [discussing the contours and scope of the preventive component of secondary RtoP] and 31-35 [discussing the ways in which more emphasis should be put on to, essentially structural, by ‘establishing the democratic structure of the State’].

<sup>1440</sup> See e.g. S Rimmer, ‘Refugees, Internally Displaced Persons and the “Responsibility to Protect”’ (March 2010) *New Issues in Refugee Research*, Research Paper No 185, UNHCR.

<sup>1441</sup> A Bellamy, ‘The Responsibility to Protect and the Problem of Military Intervention’ (2008) 84 (4) *Journal of Ethics and International Affairs* 615, 634.

<sup>1442</sup> For example Rimmer who states that ‘the 2009 developments are flawed in that even the prevention pillar is too reactive and unnecessarily shallow’. Rimmer (n 1440), 6 and 15. See also S Sharma, ‘Toward a Global Responsibility to Protect: Setbacks on the Path to Implementation’ (2010) 16 *Global Governance* 121.

<sup>1443</sup> Rimmer, *ibid*, 6.

On the other hand, the present author writer does not find the view to be entirely compelling. It tends to overlook the possibility that there may be less emphasis on using structural measures because, following alterations to the framework of RtoP at the World Summit, such measures have been largely assigned to the State under primary RtoP. Furthermore, this standpoint tends to set aside why the incorporation of structural measures has received limited State support. The present author would argue that secondary RtoP's 'slippery-slope'<sup>1444</sup> dimension may explain why continuing to discharge the majority of structural measures under non-RtoP guises (i.e. in the mandates of existing bodies), is more politically acceptable to States.<sup>1445</sup> This is vital for the efficacy of secondary RtoP's assistance pillar. In light of this, the present author considers the opposing view in present literature to be more persuasive.

The second view is that secondary RtoP should maintain a focus on operational prevention strategies. Bellamy considers that the considerable "gap" between State commitment to responsive and preventive strategies in wider practice suggests that it is unlikely that structural prevention initiatives would be routinely used in secondary RtoP practice.<sup>1446</sup> At a policy level, Bellamy<sup>1447</sup> points to how the incorporation of these initiatives would require the international community to interfere more extensively in the internal affairs of the State (e.g. its economic policies, rule of law programmes). This may seem justifiable once some harm to the population emerges, but it generally requires that the international community discharge secondary RtoP and embroil themselves in internal issues at a much earlier stage than under operational prevention strategies and therefore can provide, as Oman eloquently writes, 'a licence for economic and political engineering in countries that lack liberal democratic political structures'.<sup>1448</sup>

At a doctrinal level, it is argued that incorporating a broad range of structural prevention

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<sup>1444</sup> Alvarez, 'The Schizophrenias of RtoP' (n 1360).

<sup>1445</sup> Oman makes a similar point in her analysis of the potential implications of the handling of structural measures in the ICISS Report. She argues: 'So as a matter of brute fact, partly as a consequence of the process of globalisation itself, many states cannot perform the root cause preventive functions that a legalised responsibility to prevent would require. However, the ICISS report defines sovereignty in such a way that states under scrutiny-inevitably those of the economic south-will fail to carry out these open-ended preventive functions set out by the responsibility to prevent. And, because the report holds that a state's claim to sovereignty is partly constituted by its success in fulfilling the responsibility to protect (which encompasses the responsibility to prevent), the governments of such states could face challenges to their sovereign status if the *RtoP's* line of reasoning is followed to its logical conclusion', emphasis original. Oman (n 1415), 366-367.

<sup>1446</sup> This includes funds for responding to conflicts and those for the prevention of conflicts within the UN. As Bellamy notes: '[b]y 2005, the UN's Trust Fund for Preventive Action had received US\$33 million from thirty-five donors. This compares to an annual running cost of around US\$5 billion for the UN's peace operations. This suggests that States are willing to contribute to international peace and security efforts but that advocates of conflict prevention have not yet succeeded in persuading governments of their case'. A Bellamy, 'Conflict Prevention and the Responsibility to Protect' (2008) 14 (2) *Global Governance* 135, 143-44. See also, A Bellamy, *The Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press, Cambridge 2009) 98-131.

<sup>1447</sup> A Bellamy, 'Realising the Responsibility to Protect' (2009) 10 (2) *International Studies Perspectives* 111,

120.

<sup>1448</sup> Oman (n 1415), 367.

strategies undermines the four crime scope of RtoP.<sup>1449</sup> For example, it could require that the international community provide (i) rule of law assistance to States emerging from conflict in order to prevent further RtoP crimes arising; or (ii) development assistance to countries below the “bottom billion”<sup>1450</sup> to prevent RtoP crimes manifesting from economic inequality. Given that we remain unsure of the precise factors that trigger RtoP crimes,<sup>1451</sup> some commentators<sup>1452</sup> consider that we could reasonably expect the incorporation of further structural prevention strategies to steadily expand the type of cases in which secondary RtoP is discharged. Bellamy suggests that this could introduce the “dilemma of comprehensiveness”<sup>1453</sup> into the discharge of secondary RtoP. In his view, if we attempt to frame preventive policies under RtoP to appeal to all, particularly those who favour a structural prevention approach, we risk secondary RtoP’s prevention strategies being framed so widely that it ends ‘up meaning very little to anybody’.<sup>1454</sup>

One issue which has not been considered in the literature is the *way in which specific* structural measures should be discharged, should future practice develop to use these measures. This writer would suggest that it is important to discharge these measures in a way which ensures minorities’ protection and the prevention of RtoP crimes. The ICISS did not take the nature of the discharge of specific structural measures into account.<sup>1455</sup> However, the 2009 Report of the UNSG suggests one way in which future practice might achieve this.<sup>1456</sup> Noting that the ineffective distribution of development assistance can create the climate of inequality in which RtoP crimes might arise, the UNSG recommended that development assistance be targeted ‘to give the poor and minority groups a stronger voice in their societies’.<sup>1457</sup> This appears to call for development assistance to be distributed with respect to minorities’ position within the State. This approach could help the discharge of structural measures in future practice (e.g. development assistance) to uphold existing minority protection principles, such as the requirement for ‘programmes of co-operation and assistance amongst States’<sup>1458</sup> to ‘be planned and implemented with due regard for the

<sup>1449</sup> Bellamy, ‘Realising the Responsibility to Protect’ (n 1447), 120.

<sup>1450</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 19.

<sup>1451</sup> As Bellamy notes: ‘[a]nalysts have long argued that this is because it is difficult to draw direct causal links between preventive action and the absence of conflict’. Bellamy, ‘Conflict Prevention’ (n 1446), 144.

<sup>1452</sup> See e.g. Bellamy, *The Global Effort to End Mass Atrocities* (n 1446), 98.

<sup>1453</sup> E C Luck, “Prevention: Theory and Practice” in F Hampson et al (eds), *From Reaction to Conflict Prevention: Opportunities for the UN System* (Lynne Rienner, Boulder 2001) 256 cited in Bellamy, *ibid.*

<sup>1454</sup> E C Luck, *ibid.*

<sup>1455</sup> Rather general conditions were suggested, such as recommending that preventive strategies uphold minority rights. See ICISS Report (n 1359), 23 and contrast this with the lack of guidance on the nature of the discharge of specific structural measures, such as development at 24.

<sup>1456</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 19.

<sup>1457</sup> *ibid.*

<sup>1458</sup> UNGA Res 47/135, ‘Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities’ (1992) UN Doc A/RES/47/135 art 5 (2). (UN Declaration on Rights Persons Belonging to Minorities). The Human Rights Commission interpreted this provision as having particular significance in development assistance programmes, UN Human Rights Commission, ‘Final text of the Commentary to the

legitimate interests of persons belonging to minorities'.<sup>1459</sup>

## 2.2 To whom should Assistance be Provided?

The next issue to consider is to *whom* the international assistance should be provided. On the one hand, the position seems to be quite straightforward. A variety of relevant actors have clarified that assistance should be given to *State actors*. For example, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance stated that under secondary RtoP '[t]he international community has the responsibility to provide assistance *to the State when requested*'<sup>1460</sup> to enable them to protect populations. The International Law Commission [ILC] made a similar statement during their discussions on whether secondary RtoP's scope enabled it to be applied in the context of natural disasters.<sup>1461</sup> Noting that the UNSG's 2009 Report reiterated that the Outcome Document clearly provided for secondary RtoP to cover genocide, war crimes, crimes against humanity and ethnic cleansing,<sup>1462</sup> the ILC stated that 'it had become clear that the responsibility to protect without *the consent of the affected State* did not constitute an accepted principle under international law'.<sup>1463</sup> The UNSG also supports providing assistance to States' with their consent, recommending that the international community consider providing assistance when a State (i) 'lacks the capacity to protect its population effectively',<sup>1464</sup> (ii) 'faces an armed opposition that is threatening or committing crimes and violations relating to the responsibility to protect',<sup>1465</sup> or (iii) its 'national political leadership is weak, divided or uncertain about how to proceed'.<sup>1466</sup>

Conversely, this writer would argue that the UNSG's recommendation suggests that the issue of to whom assistance should be provided may be more complex and contentious, depending upon the specific context in the State to which the international community intends to provide assistance. Notably, none of the three contexts outlined by the UNSG

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Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (2 April 2001) UN Doc E/CN.4/Sub.2/AC.5/2001/2, 16-17.

<sup>1459</sup> UN Declaration on Rights Persons Belonging to Minorities, *ibid*, art 5 (2).

<sup>1460</sup> Emphasis added. UNHRC, 'Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance' (30 March 2010) UN Doc A/HRC/14/43, 18.

<sup>1461</sup> On these discussions, see especially International Law Commission, 'Protection of Persons in the Event of Disasters' (15 July 2009) UN Doc A/CN.4/SR.3015, 4-5, 10-12 and 17 (ILC, Protection of Persons in the Event of Disasters 15 July 2009 Report); International Law Commission, 'Protection of Persons in the Event of Disasters' (22 July 2009) (n 1387), 3, 5 and 8-9 (ILC, Protection of Persons in the Event of Disasters 22 July 2009 Report); International Law Commission, 'Second Report on the Protection of Persons in the Event of Disasters' (7 May 2009) UN Doc A/CN.4/615, 2, 4 and 5.

<sup>1462</sup> ILC, Protection of Persons in the Event of Disasters July 2009 Report, *ibid*, 10-11 and ILC, Protection of Persons in the Event of Disasters 22 July 2009 Report, *ibid*, 5.

<sup>1463</sup> Emphasis added. ILC, Protection of Persons in the Event of Disasters 22 July 2009 Report (n 1387), 3.

<sup>1464</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 15.

<sup>1465</sup> *ibid*.

<sup>1466</sup> *ibid*.

include situations in which *State actors are committing RtoP crimes*. This suggests that the UNSG does not consider that assistance should be provided to *governments who commit RtoP crimes*. This interpretation is further supported by the Secretary-General's statement that military assistance should be provided for:

'[A] range of non-coercive purposes, such as prevention, protection, peacekeeping and disarmament, or to counter armed groups that seek to both overthrow the Government by violent means and to intimidate the civilian population through random and widespread violence'.<sup>1467</sup>

The above statement suggests that the principal objective of providing international assistance is to enable national authorities to discharge primary RtoP. It suggests that this can include international assistance being provided to national authorities so that they can quash armed groups which are perpetrating RtoP crimes against the population. However, this leaves two questions unanswered. Can assistance be provided when it is *national authorities who are committing RtoP crimes*? If so, *to whom should the assistance be given*? Two trends in the case studies of Côte d'Ivoire, Libya and Syria merit reflection with respect to these questions.

First, the international community has provided military assistance (e.g. peacekeepers) to the government that it considered had won the national election despite the fact that (i) there remained some dispute over the national election results;<sup>1468</sup> (ii) the internationally recognised government did not have effective control of the territory of the State; and (iii) the internationally recognised government was implicated in the commission of RtoP crimes within the State.<sup>1469</sup> To this end, it is noteworthy that the UNSC authorised the expansion of the existing peacekeeping mission in the Côte d'Ivoire based upon the consent of who it considered to be the President elect (Ouattara).<sup>1470</sup> Second, members of the international community (e.g. third States) have provided assistance to rebel movements which have mobilised in response to the commission of RtoP crimes by the State's national authorities, despite the fact that the rebel movements (i) were not in effective control of the territory of the State; and (ii) that they are reported to have subsequently perpetrated RtoP-type crimes against supporters of the existing government.<sup>1471</sup> Third States provided military and other

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<sup>1467</sup> Emphasis added, *ibid*, 18.

<sup>1468</sup> See Bellamy and Williams's discussion of the Ivorian Constitutional Council's decision that there had been vote rigging and, therefore, that Gbagbo was the rightful winner. A Bellamy and P D Williams, 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect' (2011) 87 (4) *Int. Affairs* 825, 832.

<sup>1469</sup> Human Rights Watch, 'Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive' (*Human Rights Watch*, 9 April 2011) <<http://www.hrw.org/news/2011/04/09/c-te-d-ivoire-ouattara-forces-kill-rape-civilians-during-offensive>> accessed 14 August 2011.

<sup>1470</sup> Statement of the Representative of the Côte d'Ivoire to the UNSC, UNSC Verbatim Record (30 March 2011) UN Doc S/PV.6508.

<sup>1471</sup> UNHRC, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya' (1 June 2011) UN Doc A/HRC/17/44, 7. (Report of the International Commission of Inquiry in Libya).

assistance to the rebel movements in both Libya and Syria. For instance, France dropped arms to assist the Libyan rebels in their fight against forces loyal to the Gaddafi regime,<sup>1472</sup> whilst the UK provided the Libyan rebels representative body (the National Transitional Council) with police equipment.<sup>1473</sup> In Syria, third States (e.g. Saudi Arabia<sup>1474</sup>) are reported to have supplied arms to the Free Syrian Army in order to assist them in their fight against the Syrian national army.

Significantly, neither of the aforementioned forms of assistance was provided explicitly on the grounds of *discharging secondary RtoP*. This could suggest that assistance was not provided in order to specifically discharge secondary R2P. However, we should be cautious about simply discounting the significance of the practice for a number of reasons. Primarily, it is noteworthy that *RtoP-type language* was used to justify the provision of assistance. For example, the French military spokesman argued that France's arms drop in Libya was necessary to protect civilians because 'it appeared that in certain zones the security situation was extremely tense for these undefended populations'.<sup>1475</sup> Furthermore, we should recall that secondary RtoP is rarely explicitly referred to as a justification for the discharge of specific means. Typically, primary RtoP is referred to and the measures taken thereafter are those which have been outlined in international practice as means through which to discharge secondary RtoP. Whilst the practice to date is limited, it nevertheless raises the possibility that the collective discharge of secondary RtoP may run parallel to third States' unilateral provision of international assistance to actors other than a State's national authorities, at least in cases where the national authorities' perpetration of RtoP crimes has led to their leadership being contested. It is therefore worthwhile to consider the rationale and potential doctrinal, policy and legal implications of the trends.

It is difficult to determine *why* the international community would provide assistance to any actor which has committed RtoP crimes. However, it is arguable that the decision to provide international assistance to the elected government and rebel movements was determined on the basis that these actors were not responsible for the *emergence* of RtoP crimes in the Côte d'Ivoire, Libya or Syria. In the Côte d'Ivoire, the forces loyal to the

<sup>1472</sup> 'Libya: Russia Decries French Arms Drop to Libyan Rebels' (*BBC News*, London, 30 June 2011) <<http://www.bbc.co.uk/news/world-europe-13979632>> 5 August 2011. ('Libya: Russia Decries French Arms Drop to Libyan Rebels').

<sup>1473</sup> UK Foreign Commonwealth Office, 'UK Provides Equipment to the National Transitional Council in Libya' (30 June 2011) <<http://www.fco.gov.uk/en/news/latest-news/?view=PressS&id=624285882>> accessed 14 August 2011. (UK FCO, 'UK Provides Equipment').

<sup>1474</sup> See e.g. J Vela, 'Exclusive: Arab States Arm Rebels as UN Talks of Syrian Civil War' *The Independent* (London, 13 June 2012) <<http://www.independent.co.uk/news/world/middle-east/exclusive-arab-states-arm-rebels-as-un-talks-of-syrian-civil-war-7845026.html>> accessed 12 July 2012. Note, however, Evans' interesting observation that some Arab States may be supplying arms to the rebels for broader religious purposes. G Evans, 'Saving the Syrians' (*Project Syndicate*, 23 May 2012) <<http://www.project-syndicate.org/commentary/saving-the-syrians>> accessed 16 June 2012.

<sup>1475</sup> Statement of the French Military Spokesman (Thierry Burkhard) cited in 'Libya: Russia Decries French Arms Drop to Libyan Rebels' (n 1472).



internationally recognised government reportedly committed RtoP crimes *in response* to those perpetrated by forces loyal to the previous government. Similarly, it is alleged that the rebel movements in Libya and Syria perpetrated RtoP crimes (i) *in response* to those committed by the Libyan and Syrian governments; and (ii) on a *lesser* scale and gravity than those perpetrated by the existing governments.<sup>1476</sup> However, given the limited practice, we should bear in mind that this conclusion is tentative.

Notwithstanding this, the trend in the three case studies could possibly have a bearing on what approach the international community may adopt to determining whom to provide assistance to when State actors have perpetrated RtoP crimes. This writer would argue that the approach adopted in these cases seemed to be generally influenced by which particular actor the international community considered to have the greatest *legitimacy*.<sup>1477</sup> States providing assistance to the Libyan rebels, such as the UK, argued that the Gaddafi regime had ‘lost all legitimacy’<sup>1478</sup> and that the rebels’ leadership (the NTC) had ‘increasing legitimacy’.<sup>1479</sup> In the Côte d’Ivoire, the international community recognised who they considered to be the President Elect as the *legitimate* interlocutor with the international community.<sup>1480</sup> In Syria, some third States<sup>1481</sup> recognised the Syrian rebel leadership (the SNC) as the legitimate representative of the Syrian people, arguing that the existing government no longer had legitimacy. On the one hand, the present author would suggest that, the efficacy of using legitimacy as the basis for determining to whom assistance would be provided in such contexts is questionable. If States recognise a government to lose

<sup>1476</sup> As the final Report of the Human Rights Council fact-finding mission in Libya states: ‘The commission received *fewer* reports of facts that would amount to the commission of international crimes by forces connected with the opposition’. Report of the International Commission of Inquiry in Libya (n 1471), 7. The Report of the UN High Commissioner for Human Rights on Syria focuses overwhelmingly upon human rights violations perpetrated by State actors and pro-government militia. See particularly, UNHRC, ‘Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic’ (15 September 2011) UN Doc A/HRC/18/53, 8-10. (UNHRC, ‘Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic’).

<sup>1477</sup> Chapter two outlined that a number of third States and other actors have emphasised the “legitimacy” of the opposition groups in Libya, Syria and the Côte d’Ivoire.

<sup>1478</sup> UK Foreign Commonwealth Office, ‘Libya’ <<http://www.fco.gov.uk/en/global-issues/mena/libya/>> accessed 14 August 2011.

<sup>1479</sup> UK Foreign Commonwealth Office, ‘Libya Contact Group Meeting Concludes’ (15 July 2011) <<http://www.fco.gov.uk/en/news/latest-news/?view=News&id=631324382>> accessed 14 August 2011.

<sup>1480</sup> See for example UNSC, UNSC Verbatim Record (7 December 2010) UN Doc S/PV.6437. For a discussion of the way in which the previous government of the Côte d’Ivoire came to be recognised by the international community and the potential disadvantages of this, see Bellamy, *The Global Effort to End Mass Atrocities* (n 1446), 148.

<sup>1481</sup> See generally, Syrian National Council, ‘Syrian National Council Worldwide’ <<http://www.syriancouncil.org/en/snc-worldwide/snc-map.html>> accessed 12 May 2012 (SNC, ‘Syrian National Council Worldwide’). See further, UK Foreign Commonwealth Office, ‘Foreign Secretary: “We Have to Intensify Pressure on Syria”’ (24 February 2012) <<http://www.fco.gov.uk/en/news/latest-news/?id=734211682&view=News>> accessed 12 May 2012; E Labott, ‘Clinton to Syrian Opposition: Ousting al-Assad is Only First Step in Transition’ (CNN, 6 December 2011) <[http://articles.cnn.com/2011-12-06/middleeast/world\\_meast\\_clinton-syrian-opposition\\_1\\_assad-syrian-opposition-syrian-national-council?\\_s=PM:MIDDLEEAST](http://articles.cnn.com/2011-12-06/middleeast/world_meast_clinton-syrian-opposition_1_assad-syrian-opposition-syrian-national-council?_s=PM:MIDDLEEAST)> accessed 12 May 2012 and Syrian National Council, ‘The Syrian National Council Meets with the French Minister of Foreign Affairs and the EU High Representative of Foreign Affairs’ (24 November 2011) <<http://www.syriancouncil.org/en/press-releases/item/546-the-syrian-national-council-meets-with-the-french-minister-of-foreign-affairs-and-the-eu-high-representative-of-foreign-affairs.html>> accessed 12 May 2012.

legitimacy on the basis that it has committed RtoP crimes, then it would seem to follow that States should not recognise other actors who commit RtoP crimes (e.g. anti-government rebels) to have legitimacy either. However, this has not taken hold in practice. In cases like the Côte d'Ivoire, legitimacy seems to have been determined on the basis of *international* interpretation of the results of the national elections (e.g. UNSG's Special Representative for Côte d'Ivoire<sup>1482</sup>), despite ongoing dispute over the results at the *national* level (e.g. Ivoirian Council<sup>1483</sup>). Outside the context of national elections, such as in Libya and Syria, legitimacy seems to be based on whichever actor has committed *fewest* RtoP crimes, or at least, that they committed those crimes *after* the other side (e.g. national military, Gaddafi or Al-Assad militia) had done so. Arguably, a further factor which may have been taken into account here is that the national authorities in effective control had, at least in the contexts of Libya and Syria, failed to respond to the international community's calls for them to fulfil primary RtoP.<sup>1484</sup> In contrast, both the NTC<sup>1485</sup> and SNC<sup>1486</sup> explicitly committed themselves to protection activities, including the more effective handling of the tensions which could underscore the occurrence of future R2P crimes in Libya and Syria, such as minority protection. This factor raises a number of questions with regard to the potential implications of adopting a legitimacy approach to determining to whom to provide international assistance.

At a policy level, chapter two outlined the possibility that "legitimacy" was also the basis of some actors' recognition of the NTC and SNC as the national authorities of Libya<sup>1487</sup> and Syria.<sup>1488</sup> If this interpretation is correct, there may be a link between determining to whom assistance is to be provided and the recognition of new national authorities. This raises the possibility that regime change and the creation of new internal political arrangements can overlap with the discharge of secondary RtoP.<sup>1489</sup> This overlap can be *direct*. For example,

<sup>1482</sup> Bellamy and Williams, 'Côte d'Ivoire, Libya and the Responsibility to Protect' (n 1468), 832. ['After receiving a briefing from the Secretary General's Special Representative for Côte d'Ivoire, who insisted that Ouattara had prevailed, the Council formally supported this view in Resolution 1962 (20 December 2010) and urged the parties to respect this result'].

<sup>1483</sup> Bellamy and Williams, 'Côte d'Ivoire, Libya and the Responsibility to Protect', *ibid*.

<sup>1484</sup> Examples of the international community's calls for the national authorities to discharge primary RtoP were given in chapter three. See e.g. UNHRC Res S-16/1, 'The Current Human Rights Situation in the Syrian Arab Republic in the Context of Recent Events' (29 April 2011) UN Doc A/HRC/RES/S-16/1, para 1 (UNHRC Res S-16/1); UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, para 4. (UNSC Res 1973).

<sup>1485</sup> See generally, National Transitional Council, 'A Vision of a Democratic Libya' <[www.ntclibya.org/english/libya/](http://www.ntclibya.org/english/libya/)> accessed 12 July 2012.

<sup>1486</sup> See especially, Syrian National Council, 'National Covenant for a New Syria' (27 March 2012) <[www.syriancouncil.org/en/issues/item/618-national-covenant-for-a-new-syria.html](http://www.syriancouncil.org/en/issues/item/618-national-covenant-for-a-new-syria.html)> accessed 12 July 2012.

<sup>1487</sup> These include France, Qatar, Maldives, Italy, Gambia, UK, Senegal, Jordan, Malta, Spain, Australia, United Arab Emirates, Germany and Canada. For a list see National Transitional Council, 'International Recognition' <<http://www.ntclibya.com/InnerPage.aspx?SSID=6&ParentID=3&LangID=1>> accessed 14 August 2011. See further, 'Britain Expels Gaddafi's Embassy Staff' (*Sky News*, London, 27 July 2011) <<http://news.sky.com/home/uk-news/article/16038369>> accessed 14 August 2011 ('Britain Expels Gaddafi's Embassy Staff').

<sup>1488</sup> See generally, SNC, 'Syrian National Council Worldwide' (n 1481).

<sup>1489</sup> On the interplay between regime change and secondary RtoP, see especially A Bellamy, 'The Responsibility to Protect and the Problem of Regime Change' (*e-International Relations*, 27 September 2011) <[www.e-](http://www.e-)

interpreting measures used to discharge secondary RtoP in a particular case to date, such as some third States' argument that the arms embargo applied in Libya<sup>1490</sup> did not cover the rebels<sup>1491</sup> and, furthermore, the way in which the No Fly Zone helped the rebels to gain ground against the regime.<sup>1492</sup> Alternatively it can be *indirect*. For instance, providing unilateral assistance to the opposition (e.g. police equipment,<sup>1493</sup> arms<sup>1494</sup>) and unilateral actions against the regime (e.g. sanctions<sup>1495</sup>), alongside discharging secondary RtoP collectively (e.g. collective sanctions and use of armed force in Libya<sup>1496</sup> and, in Syria, diplomatic condemnation of the harm to the population<sup>1497</sup>). Connecting secondary RtoP's discharge with regime change could lead some States to stand back from, or completely abandon, their acceptance of RtoP. The chief example of this is the way in which Russia has, since RtoP's invocation in Libya, frequently criticised RtoP.<sup>1498</sup>

It is also necessary to bear in mind that "legitimacy" is open to interpretation and can be transient. Providing assistance which can help to overthrow a government perpetrating RtoP crimes based on perceptions of "legitimacy" can create the breeding ground for the perpetration of further RtoP crimes in the State. Practice to date suggests that the risk of new RtoP crimes can disproportionately threaten minorities in the territory. This can be due to

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ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change/> accessed 12 July 2012; A Bellamy, 'Stopping Genocide and Mass Atrocities: The Problem of Regime Change' (*Protection Gateway*, 6 July 2012) <<http://protectiongateway.com/2012/07/06/stopping-genocide-and-mass-atrocities-the-problem-of-regime-change/>> accessed 12 July 2012 and L Arbour, 'For Justice and Civilians, Don't Rule Out Regime Change' *The Globe and Mail* (Toronto, 26 June 2012) <<http://www.theglobeandmail.com/commentary/for-justice-and-civilians-dont-rule-out-regime-change/article4372211/>> accessed 12 July 2012.

<sup>1490</sup> UNSC Res 1970 (2011) UN Doc S/RES/1970, paras 9-14. (UNSC Res 1970).

<sup>1491</sup> The varying positions taken on this issue by States are examined later in this chapter, in the section on the scope of secondary RtoP's "Timely and Decisive Response Pillar". On the debate, see N Watt, 'Libya: Britain Backs Clinton View that UN has Sanctioned Arming Rebels' *The Guardian* (London, 30 March 2011) <<http://www.guardian.co.uk/world/2011/mar/30/libyan-britain-clinton-un-rebels>> accessed 16 June 2011; 'Libya: Russia Decries French Arms Drop to Libyan Rebels' (n 1472) and R Booth, 'Arming Libya Rebels Not Allowed by UN Resolutions, Legal Experts Warn US' *The Guardian* (London, 30 March 2011) <<http://www.guardian.co.uk/world/2011/mar/30/arming-libya-rebels-america-warned>> accessed 16 June 2011.

<sup>1492</sup> D H Levine, 'Some Concerns about the Responsibility Not to Veto' (2011) 3 (3) GRtoP 323, 343.

<sup>1493</sup> UK FCO, 'UK Provides Equipment' (n 1473).

<sup>1494</sup> Statement of the French Military Spokesman, Thierry Burkhard, cited in 'Libya: Russia Decries French Arms Drop to Libyan Rebels' (n 1472) and Vela (n 1474).

<sup>1495</sup> For example, those of the United States and Turkey against the Syrian regime. See respectively White House Office of the Press Secretary, 'Executive Order: Syria Human Rights Abuses' (29 April 2011) <<http://www.whitehouse.gov/the-press-office/2011/04/29/fact-sheet-executive-order-syria-human-rights-abuses>> accessed 18 July 2012 (White House Executive Order April 2011); White House Office of the Press Secretary, 'Executive Order 13573: Blocking Property of Senior Officials of the Government of Syria' (18 May 2011) <<http://www.whitehouse.gov/the-press-office/2011/05/18/executive-order-blocking-property-senior-officials-government-syria>> accessed 5 January 2012 (White House Executive Order May 2011); White House Office of the Press Secretary, 'Executive Order 13582: Blocking Property of the Government of Syria and Prohibiting Certain Transactions with respect to Syria' (18 August 2011) <<http://www.whitehouse.gov/the-press-office/2011/08/18/executive-order-13582-blocking-property-government-syria-and-prohibiting>> accessed 5 January 2012 (White House Executive Order August 2011) and 'Turkey Imposes Economic Sanctions on Syria' (*BBC News*, London, 30 November 2011) <<http://www.bbc.co.uk/news/world-europe-15959770>> accessed 5 January 2012 (Turkey Imposes Economic Sanctions on Syria').

<sup>1496</sup> UNSC Res 1970 (n 1490), paras 9-25 and UNSC Res 1973 (n 1484), paras 13-16 and 19-23 [sanctions] and 4-12 [use of armed force].

<sup>1497</sup> See e.g. UNSC Presidential Statement, 'The Situation in the Middle East' (3 August 2011) UN Doc S/PRST/2011/16. (UNSC Presidential Statement, 'The Situation in the Middle East' 2011).

<sup>1498</sup> See especially, Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (25 June 2012) UN Doc S/PV.6790.

minorities being considered to remain loyal to the previous and “illegitimate” government. Libya is a strong example. The rebels are reported to have perpetrated RtoP-type crimes against migrant workers (so-called ‘new minorities’<sup>1499</sup>). As Gaddafi has used mercenaries of sub-Saharan descent, migrant workers from the sub-Saharan region were mistaken for mercenaries.<sup>1500</sup> Accordingly, Libya highlights that a legitimacy approach to providing assistance can marginalise certain sections of the population, particularly those who remain, or are believed to be, loyal to the existing regime.

Whilst events in Syria are still unfolding at the time of writing, there is the potential for a similar, though slightly different, situation to arise. The Syrian regime is led by the Alawite minority and there is a general feeling of ‘better the devil you know than the devil you don’t’<sup>1501</sup> among many of the other religious and ethnic minority groups in the State. Ethnic Kurds, Christians and Jews are reported to be wary of a “new Syria” because the existing regime supported a “secular Syria”.<sup>1502</sup> The fear is that the religious and ethnically orientated lines which are increasingly emerging within anti-government movements make the maintenance of secularism in the “new Syria” less and less likely.<sup>1503</sup>

The situations in Libya and Syria tend to resonate with the ICISS’s warning that reverse ethnic cleansing can occur in territories going through the transition from crises and conflicts to peace.<sup>1504</sup> However, there is no longer an explicit rebuilding responsibility in the RtoP framework. Admittedly, the gap created by the removal of this responsibility can be somewhat filled by (i) existing international mandates, not least the PBC; and (ii) providing for States to discharge some of the measures that were delineated as part of the “responsibility to rebuild” in the ICISS Report.<sup>1505</sup> Can these developments sufficiently fill the void created by the removal of a distinct rebuilding responsibility? The presence of

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<sup>1499</sup> UNCHR (Sub-Commission), ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities’ (1979) UN Doc E/CN.4/Sub.2/384/Rev.1, 10. (UNCHR (Sub-Commission), ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities’).

<sup>1500</sup> Report of the International Commission of Inquiry in Libya (n 1471) 6.

<sup>1501</sup> This phrase is borrowed from J Welsh, ‘Implementing the Responsibility to Protect: Where Expectation Meets Reality’ (2010) 24 (4) *Ethics & International Affairs* 415, 428.

<sup>1502</sup> On this issue, see especially M Rafizadeh, ‘For Syria’s Minorities, Assad is Security’ (*Al Jazeera*, 16 September 2011) <<http://www.aljazeera.com/indepth/opinion/2011/09/2011912135213927196.html>> accessed 12 July 2012 and S Starr, ‘Syria’s Minorities are Afraid - After Assad, they shouldn’t be’ (*Huffington Post*, 9 July 2012) <[http://www.huffingtonpost.co.uk/stephen-start/syrias-minorities-are-afraid\\_b\\_1652651.html](http://www.huffingtonpost.co.uk/stephen-start/syrias-minorities-are-afraid_b_1652651.html)> accessed 12 July 2012. The uncertainty surrounding the tensions between various groups may influence decisions over whether or not to take more coercive action in Syria. On this issue, see Patrick’s observations on whether or not Syria could meet the ICISS criteria for consequences of intervention in S M Patrick, ‘RIP for RtoP? Syria and the Dilemmas of Humanitarian Intervention’ (*Council on Foreign Relations*, 12 June 2012) <<http://blogs.cfr.org/patrick/2012/06/12/rip-for-r2p-syria-and-the-dilemmas-of-humanitarian-intervention/>> accessed 10 July 2012.

<sup>1503</sup> Rafizadeh, *ibid*.

<sup>1504</sup> ICISS Report (n 1359), 40. For a discussion of reverse ethnic cleansing in the field of minority protection more generally, see particularly W Kymlicka, ‘The Internationalisation of Minority Rights’ (2008) 6 (1) *ICON* 1, 24.

<sup>1505</sup> For an interesting discussion of the way in which Libyans’ should themselves take “ownership” of the rebuilding process, see R Thakur, ‘Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism’ (2011) 7 (4) *Security Challenges* 13, 23-24 <<http://www.securitychallenges.org.au/ArticlePages/vol7no4Thakur.html>> accessed 2 February 2012.

UNMIL<sup>1506</sup> to help with Libya's transitional period did not stop multiple small conflicts breaking out along ethnic lines within the territory following the removal of the regime and the NTC taking interim power.<sup>1507</sup> Furthermore, there is a risk that the new authorities of the State will not take the necessary steps to respond to harm to 'new minorities'.<sup>1508</sup> State officials are not immune from the legacy of previous violence or holding grievances against those who are seen to have supported the previous regime. These issues suggest that there were two benefits to maintaining a distinct rebuilding responsibility. First, it specifically focused on protecting populations from RtoP crimes and, therefore, could have a stronger role than existing mechanisms like the PBC which tend to focus on the general development of post-conflict/crises territories.<sup>1509</sup> Second, the international community played a central role in its discharge, thereby diminishing the risk of national authorities failing to adopt the measures necessary for ensuring that grievances against certain sections of the population did not impact on their protection in the post-conflict/crises phase.

Notwithstanding these merits, the field of minority protection helps us to understand some of the broader policy reasons which may have underscored the decision to remove an explicit rebuilding responsibility. The ICISS Report acknowledged that in some instances the outcome of the use of armed force may require that some form of autonomous arrangement be put in place for minority groups in order to reduce the prospect of further RtoP crimes, including reverse ethnic cleansing.<sup>1510</sup> This is reminiscent of the Copenhagen Document's reference to autonomous arrangements being an example of best practice for minority protection.<sup>1511</sup> However, States have flatly rejected the formulation of any *right to* autonomy for minority groups because of the implication that this could encourage territorially cohesive minorities to claim that this right extends to their secession from the State.<sup>1512</sup> Any connection between autonomy and secondary RtoP's discharge implicit to the rebuilding responsibility would have therefore only increased the reservations of those States who

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<sup>1506</sup> On the mandate of the UN Support Mission in Libya (UNSMIL), see UNSC Res 2009 (16 September 2011) UN Doc S/RES/2009, para 12.

<sup>1507</sup> On this issue, see particularly, R Falk, 'Libya After Gaddafi: A Dangerous Precedent?' (*Al Jazeera*, 22 October 2011) <<http://www.aljazeera.com/indepth/opinion/2011/10/20111022132758300219.html>> accessed 6 May 2012.

<sup>1508</sup> UNCHR (Sub-Commission), 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' (n 1499), 10.

<sup>1509</sup> Chapter one noted that Schabas makes a similar observation regarding the PBC's mandate. W A Schabas, *Report: Preventing Genocide and Mass Killing: The Challenge for the United Nations* (Minority Rights Group International, London 2006) 12.

<sup>1510</sup> ICISS Report (n 1359), 36.

<sup>1511</sup> Commission on Security and Cooperation in Europe, 'Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE' (adopted 29 June 1990) para 35 <<http://www.osce.org/odihr/elections/14304>> accessed 12 November 2012.

<sup>1512</sup> As Kymlicka explains: '[I]n those cases where minorities seized territory and established their own autonomous governments, the results were often various forms of discrimination and harassment-- even ethnic cleansing-- against anyone who did not belong to the minority' and further 'there is anxiety that such minorities are irredentist-- that is, that they wish to redraw international boundaries so as to unite (or reunite) the territory where they live with their adjacent kin State. Indeed, it is often assumed that they would collaborate willingly with their kin State if it militarily invaded the country in order to claim this territory.' Kymlicka (n 1504) 22-25.

considered that secondary RtoP could be used as a pretext for regime change and the creation of new territorial arrangements, thereby entirely undermining the State's territorial integrity.

### 2.2.1 Present Literature

The approach and potential ramifications of international practice concerning the recipient of international assistance has received limited attention in present literature. Bellamy and Williams are a notable exception. They correctly observe that the UNSC based the deployment of peacekeepers on the consent of the internationally recognised President Elect<sup>1513</sup> and, although recognising that the reasons for this action are unclear,<sup>1514</sup> accurately acknowledge that this approach may have some bearing on contemporary understandings of the scope of 'host State consent',<sup>1515</sup> at least in RtoP cases.

Wider arguments in the literature also bear some relevance on this issue. One argument which merits greater reflection is Megret's suggestion that third States' may support groups who seek to overthrow governments for political, rather than protective, reasons.<sup>1516</sup> In this line he notes that 'the long history of states supporting violent groups that had very little to do with a last-ditch effort to avert atrocities'.<sup>1517</sup> The present author would argue that this contention suggests that we should be cautious regarding the risk that broader political reasons (e.g. discontent with the existing regime in general) may underscore the decision of some members of the international community to provide assistance to actors who seek to overthrow the regime which is in effective control, especially in cases where (i) the actors receiving assistance have also been implicated in the commission of RtoP crimes; and/or (ii) the provision of assistance accompanies the recognition of the recipients as the legitimate national authorities. Megret suggests two ways of minimising this risk. First, ensure assistance is provided by the international community collectively, rather than by third States unilaterally.<sup>1518</sup> Second, provide military assistance to rebel movements only when they:

'[F]ight at least significantly to prevent atrocities and protect populations; their ability to do so in a way that is compatible with humanitarian values; their chances

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<sup>1513</sup> Bellamy and Williams, 'Côte d'Ivoire, Libya and the Responsibility to Protect' (n 1468), 832.

<sup>1514</sup> Bellamy and Williams, *ibid*.

<sup>1515</sup> Bellamy and Williams, *ibid*.

<sup>1516</sup> This argument was raised as part of the wider discussion in the literature concerning whether secondary RtoP may have essentially *internationalised* the protection of populations. Nouwen and Megret are useful examples. Whilst Nouwen criticises secondary RtoP for subsuming populations ability to protect themselves from RtoP crimes, Megret suggests that the international community endorse that there is an obligation to assist populations own efforts to resist RtoP crimes. S Nouwen, 'RtoP and Complementarity: Critical Lessons from the Practice of the ICC' (Paper presented at the European Science Foundation 'The Responsibility to Protect: From Principle to Practice' conference, 8-12 June 2010, Linköping, Sweden) and F Megret, 'Beyond the 'Salvation' Paradigm: Responsibility to Protect (Others) vs. the Power of Protecting Oneself' (2009) 40 *Security Dialogue* 575.

<sup>1517</sup> Megret, *ibid*, 589.

<sup>1518</sup> *ibid*.

of success; and the risk that the use of violence might precipitate a harsh reaction from the State'.<sup>1519</sup>

Megret's proposals could be ineffective. It would be difficult to attain consensus among the international community regarding providing assistance to rebel movements because of the political interests that this impacts upon (e.g. non-interference in internal affairs, principle of neutrality in civil wars). In the absence of consensus, Libya illustrates that some third States will proceed to provide unilateral assistance, including military assistance.<sup>1520</sup> Furthermore, although Megret's second criterion could perhaps guide the provision of military assistance in some cases, the provision of assistance to rebels in Libya in spite of reports that they perpetrated RtoP-type crimes, suggests that not all States be deterred by fighting which is incompatible 'with humanitarian values'.<sup>1521</sup>

Another argument in present literature which merits consideration here is secondary RtoP's relationship with 'suicidal rebellions'.<sup>1522</sup> Two opposing views are taken on this relationship. On the one hand, Bellamy<sup>1523</sup> denies that there is a credible relationship between secondary RtoP and suicidal rebellions because, in his mind, the gravity of RtoP crimes laid down in international definitions of crimes against humanity, genocide and war crimes, would require that potential suicidal rebels to 'submit themselves to unspeakable levels of harm to gain the action of the international community'.<sup>1524</sup> In contrast, Kuperman<sup>1525</sup> suggests that there are two forms of suicidal rebellions. The first is where rebels acquire and use arms in a bid to achieve their wider political and/or territorial objectives, irrespective of whether they are able to adequately defend the population from the States response.<sup>1526</sup> The second is where rebels deliberately prompt the State to perpetrate violence against them in order to attract international intervention on their behalf and to thereafter further their own political cause.<sup>1527</sup> The present author finds Kuperman's view to be more persuasive. Bellamy's argument tends to presume that suicidal rebellions would encourage the State only to perpetrate harm against the rebels themselves. Whilst this could be the case in some instances, Libya and Syria raise the possibility that rebel movements will mobilise in *response* to harm sustained by *the broader population* and seek international intervention to help them to establish new political arrangements which, in their view, will better secure

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<sup>1519</sup> *ibid.*

<sup>1520</sup> 'Libya: Russia Decries French Arms Drop to Libyan Rebels' (n 1472) [also outlining Russia's response to unilateral actions] and UK FCO, 'UK Provides Equipment' (n 1473).

<sup>1521</sup> Megret (n 1516), 589.

<sup>1522</sup> Or the "moral hazard" of doctrines permitting armed force for human protection purposes. A Kuperman, 'The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans' (2008) 52 *International Studies Quarterly* 49.

<sup>1523</sup> Bellamy, 'Problem of Military Intervention' (n 1441).

<sup>1524</sup> *ibid.*, 631-632.

<sup>1525</sup> Kuperman (n 1522).

<sup>1526</sup> *ibid.*, 51 (what Kuperman describes as "irresponsible" rebellions).

<sup>1527</sup> *ibid.* (what Kuperman terms as "fraudulent" rebellions).

populations' protection. Thus, to the extent that a rebellion can be characterised as "suicidal" because the rebels lack the means to adequately protect the population from RtoP crimes, the provision of military and other assistance to rebel groups can be one way of making rebellions less "suicidal" and more effective. At one level, this can help to ease some of the policy concerns of States which can arise when there is delay or deadlock to international action. The conflicts emerging in the backdrop of the "Arab Spring" have been exploited by offers of military assistance to anti-government rebels by non-State groups with their own political agenda. The influx of Al-Qaeda affiliated groups in Yemen and Syria are examples. When the political will is present, international action can be taken in response to this exploitation and to address the concerns of third States that it raises with respect to their *own national* security. We see this with the UNSC's clear condemnation of the presence of such elements in Yemen.<sup>1528</sup> When the political will to act is not present, third States can be left with a choice between (i) leaving the rebels without outside assistance, knowing that this will encourage them to accept the offers of assistance from terrorist factions and, thereby, create the conditions in which wider threats to the maintenance of international peace and security in the immediate or longer term can flourish;<sup>1529</sup> or (ii) provide assistance to the rebels. However, providing assistance to rebel movements may also reinforce the reluctance of some States to support international action in a particular case. The strongest example of this is Russia's argument before the UNSC on the situation in Syria. After denouncing the declarations of some third States that the Al-Assad regime no longer has legitimacy, Russia argued that the prospect of civil war in Libya was increasing and that the Syrian opposition groups were 'hoping for foreign sponsors'<sup>1530</sup> for their cause. Accordingly, the provision of international assistance to non-State actors can be somewhat of a vicious circle when (i) it is used in conjunction with outside support for regime change; and (ii) to try and circumvent the harm to the population arising as the result of the international community's deadlock.

Finally, an issue raised by Thakur<sup>1531</sup> points to a broader implication which providing assistance to those with perceived "legitimacy" could have. Discussing RtoP's role in Burma, Thakur notes that '[u]nappealing as they might be, the generals are in effective control of Burma. The only way to get aid quickly to where it is needed most is with the cooperation of the authorities'.<sup>1532</sup> This argument highlights that one practical benefit of

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<sup>1528</sup> UNSC Res 2014 (2011) UN Doc S/RES/2014, para 13.

<sup>1529</sup> For an excellent discussion of the difficult decisions involved in rebels acceptance of assistance from terrorist groups, see D Aaronovitch, 'Remember Bosnia: Seedbed of Radical Islam' *The Times* (London, 1 June 2012) <<http://www.thetimes.co.uk/tto/opinion/columnists/davidaaronovitch/article3431388.ece>> accessed 9 August 2012.

<sup>1530</sup> Statement of the *Russian Federation* to the UNSC (4 October 2011) UN Doc S/PV.6627.

<sup>1531</sup> R Thakur, "RtoP: A Forward-Looking Agenda" Kemp, Popovski and Thakur (n 1369). See further, R Thakur, "The Responsibility to Protect and the North-South Divide" in Thakur, *The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics* (n 1412), 152-154.

<sup>1532</sup> Thakur, "RtoP: A Forward-Looking Agenda", *ibid*, 18 and Thakur, "The Responsibility to Protect and the North-South Divide", *ibid*, 153.



maintaining the traditional approach to government recognition, even in secondary RtoP cases, is that the protection of the population can often require that the authority with whom the international community cooperate *are in effective control* of the territory. Indeed, the Libyan rebel's lack of effective control of large parts of Libya made it extremely difficult for international humanitarian assistance to actually reach sections of the population such as the Berber minority in the Nafusa mountain range.<sup>1533</sup> Accordingly, there is a need to be cautious that determining to whom assistance should be provided on the basis of legitimacy, rather than effective control, does not *inhibit* the protection of the populations on the ground.

## 2.3 The Consensual Nature of International Assistance: Obtaining Consent

What steps can be taken in order to *obtain consent* for the provision of assistance? The capacity for consent to be coerced or induced merits consideration in light of relevant practice.

### 2.3.1 Acquiring Consent: Coercion and Inducements

When the Burmese junta refused to permit access to humanitarian agencies, France<sup>1534</sup> proposed that the UNSC permit humanitarian assistance to be provided without consent through the use of force. Whilst this proposal was unsuccessful,<sup>1535</sup> it was supported by the European Parliament.<sup>1536</sup> This suggests that *at least some actors* consider that the consent of the actor in the State concerned may be *coerced* by pointing to the availability of non-peaceful secondary RtoP responsive measures or, indeed, *overridden* if the protection of the population so requires.

The drawbacks of coercing consent extend beyond the difficulty in gaining consensus on its usage, however. The UNSC's original authorisation for the deployment of peacekeepers to Darfur is a useful illustration of the broader implications of a coercive approach,

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<sup>1533</sup> See National Transitional Council of Libya  
<<http://ntclibya.com/InnerPage.aspx?SSID=15&ParentID=11&LangID=1>> accessed 9 August 2011 and National Transitional Council, 'Update on the Nafusa Mountain Crisis' (19 May 2011)  
<<http://www.ntclibya.com/NewsDetail.aspx?NewsID=65&SSID=13&ParentID=11&LangID=1&Type=2>>  
accessed 9 August 2011.

<sup>1534</sup> 'Statement of the Representative of France to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898 [reiterating the need to provide humanitarian assistance to protect the population of Burma].

<sup>1535</sup> This was a closed meeting and therefore it is not clear which members opposed this proposal or the reasons for doing so.

<sup>1536</sup> The European Parliament Resolution recalled the French Foreign Minister's citation of RtoP with regard to Burma and recommending that the proposal be raised before the Security Council. See European Parliament Resolution, 'The Tragic Situation in Burma' (May 2008) EP Doc P6\_TA(2008)0231, paras K and 5.

specifically coercing consent by demonstrating the political will to authorise peacekeepers without *the prior consent of the government*. It should first be noted that the deployment of peacekeepers could be an effective means of responding to RtoP crimes under secondary RtoP's 'timely and decisive response'<sup>1537</sup> component. However, it is dealt with here because the UNSG's 2012 RtoP Report stresses that this is a consensual reaction and, accordingly, falls within secondary RtoP's assistance component.<sup>1538</sup> Twelve States<sup>1539</sup> voted in favour of the UNSC Darfur peacekeeping Resolution, giving mixed reasons for their affirmative votes. Argentina<sup>1540</sup> and the UK<sup>1541</sup> stood alone in expressly referring to secondary RtoP to explain their affirmative votes, arguing that the action was necessary to protect the population. China,<sup>1542</sup> Qatar<sup>1543</sup> and Russia<sup>1544</sup> abstained from the vote, challenging the acceptability of authorising consensual measures prior to consent being given by the intended recipient State. Sudan refused to concede to the authorisation, considering it to be an attempt to place Sudan under 'colonisation'.<sup>1545</sup> This resonates with the ICISS view that one implication of coercing consent is that it is 'more likely to engender greater political resistance from the targeted State'.<sup>1546</sup>

Is it therefore more viable to follow the ICISS's recommendation and *induce* consent?<sup>1547</sup> An inducement approach seems consistent with the Outcome Document's reference to the international community "encouraging"<sup>1548</sup> States to fulfil primary RtoP. However, practice to date has not explicitly referred to the use of inducements and, therefore, their effectiveness in RtoP cases cannot be determined. This is probably because inducements, particularly those of a positive nature, are of a largely preventive or proactive character. They are designed to crystallise before an RtoP situation breaks out or in its aftermath, in order to encourage the State to uphold primary RtoP.

<sup>1537</sup> Outcome Document (n 1336), para 139.

<sup>1538</sup> UNSG Report 2012, 'Timely and Decisive Response' (n 1350), 5. ['United Nations peacekeeping missions are based on the principle of consent and generally deploy in support of and with the overall consent of the host State. As such, they fall under pillar two and are to be distinguished from pillar three tools'].

<sup>1539</sup> These were: Argentina, Congo, Denmark, France, Ghana, Greece, Japan, Peru, Slovakia, UK, United Republic of Tanzania, US. UNSC, UNSC Verbatim Record (31 August 2006) UN Doc S/PV.5519.

<sup>1540</sup> Argentina argued that the authorisation was necessary because 'the Security Council cannot shirk its responsibility to protect'. Statement of *Argentina* to the UNSC, *ibid*.

<sup>1541</sup> The UK recalled States commitment at the World Summit to assist States to protect their populations and noted that it was: '[V]ery pleased that this is the first Security Council resolution mandating a United Nations peacekeeping operation to make an explicit reference to this responsibility'. Statement of the Representative of the *United Kingdom* to the UNSC, *ibid*.

<sup>1542</sup> Statement of the Representative of *China* to the UNSC, *ibid*.

<sup>1543</sup> Statement of the Representative of *Qatar* to the UNSC, *ibid*.

<sup>1544</sup> Statement of the Representative of the *Russian Federation* to the UNSC, *ibid*.

<sup>1545</sup> 'U.N. Approves Peacekeeping Force in Darfur, Despite Sudan Opposition' (*PBS News Hour*, 31 August 2006) <[http://www.pbs.org/newshour/updates/africa/july-dec06/darfur\\_08-31.html](http://www.pbs.org/newshour/updates/africa/july-dec06/darfur_08-31.html)> accessed 11 April 2012.

<sup>1546</sup> ICISS Report (n 1359), 25.

<sup>1547</sup> *ibid*.

<sup>1548</sup> Outcome Document (n 1336), para 138.

### 2.3.2 Present Literature

The use of coercion has been both commended and criticised by commentators.<sup>1549</sup> In relation to coercion, Bellamy<sup>1550</sup> draws upon Stamnes<sup>1551</sup> “Speech Act” theory of RtoP. He argues that using the “RtoP label”, such as France did in relation to Burma, can help to coerce consent for assistance because of the opinion that RtoP is a “slippery slope”<sup>1552</sup> toward forcible intervention.<sup>1553</sup> However, Bellamy has also argued that France’s response to Burma serves to “militarise” the RtoP framework, thereby moving ‘attention away from non-military solutions’.<sup>1554</sup> To Bellamy, the militarisation of RtoP suggests that there are ‘serious misunderstandings about what RtoP says (and does not say)’,<sup>1555</sup> specifically that the tendency is to focus on militarised action and overlook the need for a more comprehensive development of the international assistance component.<sup>1556</sup> The present author agrees that implying or threatening the use of armed force to provide populations with the assistance needed when relevant actors fail to consent to international assistance does introduce a coercive dimension to the assistance component. However, the present author also considers that we may sometimes need to accept that coercing (and, yes, militarising) assistance through the threat of armed force can be one of few options left to the international community in some cases.<sup>1557</sup> Furthermore, Burma testifies to the fact that a coercion approach can ultimately be effective for the very reason that it reinforces secondary RtoP’s potential ‘slippery-slope’<sup>1558</sup> to the national authorities at issue. Arguably, it is through such

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<sup>1549</sup> See particularly, M Matthews, ‘Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur’ (2008) 31 Boston College International and Comparative Law Review 137, 150-52; N Wheeler, *Operationalising the Responsibility to Protect: The Continuing Debate Over where Authority should be Located for the Use of Force* (Norwegian Institute for International Affairs, Oslo 2008) 10-18; N Wheeler and T Dunne, “Operationalising Protective Intervention: Alternative Models of Authorisation” in W Knight and F Egerton (eds), *The Routledge Handbook of the Responsibility to Protect* (Abingdon: Routledge, 2012) 89-93 and A Bellamy ‘The Responsibility to Protect - Five Years On’ (2010) 24 (2) Ethics and International Affairs 143,147-53.

<sup>1550</sup> Bellamy, *ibid.*

<sup>1551</sup> E Stamnes, “‘Speaking RtoP’ and the Prevention of Mass Atrocities’ (2009) 1 (1) Global Responsibility to Protect 70.

<sup>1552</sup> Alvarez, ‘The Schizophrenias of RtoP’ (n 1360).

<sup>1553</sup> Bellamy, ‘The Responsibility to Protect - Five Years On’ (n 1549), 159.

<sup>1554</sup> Bellamy, ‘Problem of Military Intervention’ (n 1441), 634.

<sup>1555</sup> *ibid.*

<sup>1556</sup> To this effect, Bellamy writes that ‘the problem highlighted’ by France’s response to Burma ‘seems to be that there is something inherently militaristic about RtoP that *diverts attention away from non-military solutions*. On closer inspection, however, this is a problem produced by serious misunderstandings about what RtoP says (and does not say) and about its potential to harness a wide range of measures—military and non-military—to the prevention of genocide and mass atrocities and the protection of populations from them. As noted earlier, the use of military intervention is only one of four key commitments associated with RtoP as conceived by the World Summit. The other three—especially the commitments to encourage and help states to fulfil their responsibility, and to use a range of non-coercive measures to prevent and protect vulnerable populations—*have not attracted the attention they deserve and remain under-conceptualised*’, *ibid.*, emphasis added.

<sup>1557</sup> To be more specific, in cases where, as in Burma, (i) consent to international assistance is not forthcoming; appropriate peaceful responsive measures cannot be undertaken due to deadlock in the Security Council and there remains ambiguity over whether the requisite degree of harm for the activation of ‘non-peaceful’ responsive measures has been sustained by the population at issue.

<sup>1558</sup> Alvarez, ‘The Schizophrenias of RtoP’ (n 1360).

practice that the more specific aspects of secondary RtoP's discharge can be contoured, including in terms of clarifying what steps can and should be taken in cases where a gap in protection could otherwise arise due to national authorities non-cooperation and the international community's deadlock. Accordingly, the present author would argue that France's efforts to coerce Burma's consent may be seen as an effort to better define the parameters of international assistance, not as a pre-occupation with secondary RtoP's military components or example of secondary RtoP's assistance component remaining 'under-conceptualised'.<sup>1559</sup>

Inducing consent receives limited attention in present literature. A notable exception is Wheeler<sup>1560</sup> who draws upon non-RtoP practice to suggest that a variety of negative inducements could be utilised. These include the withdrawal of military and economic assistance (e.g. World Bank and IMF loans<sup>1561</sup>) to the intended recipient State. The present author would suggest that negative inducements should always be approached cautiously, however. The kind of negative economic inducements discussed by Wheeler should be offset against the specific economic situation of the intended recipient State. In cases like Kenya,<sup>1562</sup> economic difficulties within the State can create tensions between sections of the population (e.g. competition over resources) and, ultimately, lead to violent clashes between groups and the perpetration of RtoP crimes. Accordingly, decision makers should be mindful of the potential for the application of negative inducements to detrimentally affect the population and contribute to the kind of tensions which can develop into the perpetration of RtoP crimes.

In view of the potential risks associated with negative inducements, the present author would suggest that future practice might also consider utilising positive inducements. With regard to what form positive inducements could take, guidance may be drawn from the UNSG's recommendation that they could include 'promises of new funding or investments or the promise of new trade terms'.<sup>1563</sup> Furthermore, future practice might make more use of those inducements which do not detract from what a State (and its population) already has but, rather, establish conditions which, once met, allow the State (and its population) to achieve more. To achieve this, fuller consideration could be given to the UNSG's recommendation for introducing RtoP criteria into peer review mechanisms.<sup>1564</sup> For example, supplementing the Copenhagen criteria for admission to the European Union with a

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<sup>1559</sup> Bellamy, 'Problem of Military Intervention' (n 1441), 634.

<sup>1560</sup> Wheeler, 'Operationalising the Responsibility to Protect: The Continuing Debate over where Authority Should be Located for the Use of Force' (n 1549) and Wheeler and Dunne, "Operationalising Protective Intervention: Alternative Models of Authorisation" (n 1549) 90-92.

<sup>1561</sup> *ibid*, 12-13.

<sup>1562</sup> On the economic tensions which underscored the post-election violence in Kenya, see UNHCHR, 'Report from the OCHR Fact-Finding Mission to Kenya (6-28 February 2008)' (2008), 5-6 and 9-10.

<sup>1563</sup> ICISS Report (n 1359), 24.

<sup>1564</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 13.

requirement that the State is implementing primary RtoP effectively.<sup>1565</sup> There is also scope for expanding coercion tactics in light of recent international practice on the recipient of the international assistance. In this line, one form of coercion could be simply stating that if the government does not consent to the provision of assistance, the international community will look to other “legitimate” actors to provide consent.

## 2.4 Types of Assistance: Humanitarian, Military and Diplomatic

When the consent of the relevant actor in the State concerned is present, the international community may provide humanitarian, military or diplomatic assistance. An overarching theme regarding the provision of the aforementioned assistance in the cases in which RtoP has been cited to date is that the measures are *tailored to the specific context at hand*. Two trends in practice deserve consideration here.

### 2.4.1 The Scope and Objectives of Providing Assistance

The first trend is members of the international community will be involved in the practical provision of the assistance to varying degrees. In some cases the scope of the international community’s role may be limited to deploying the practical support for the relevant State actors to then distribute. In other cases, the international community’s role can extend to deploying actors to undertake a proactive assistance role on the ground. This can be in order to ensure that the assistance provided actually reaches the relevant actor in the State concerned for appropriate distribution to protect the population. For instance, in Somalia third States gave practical support (e.g. deployment of ships) to ensure that the humanitarian aid provided was not intercepted by non-State actors, such as the Somali pirates.<sup>1566</sup> Alternatively, it can be undertaken in order to support the relevant actors in the State concerned to take the necessary steps to protect the population from RtoP crimes. In cases involving the provision of military assistance, the varying roles have been accommodated within the mandate of the peacekeeping mission.<sup>1567</sup> For instance, in the Côte d’Ivoire<sup>1568</sup>

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<sup>1565</sup> See Statement of the Representative of *Italy* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97. See further on these criteria, ‘Summaries of Legislation: Accession Criteria (Copenhagen Criteria)’ (*Europa*) <[http://europa.eu/legislation\\_summaries/glossary/accession\\_criteria\\_copenhagen\\_en.htm](http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhagen_en.htm)> accessed 14 August 2012 and C Johnson, ‘The Use and Abuse of Minority Rights: Assessing Past and Future EU Policies toward Accession Countries of Central, Eastern and South-Eastern Europe’ (2006) 13 Int. J. Minority and Group Rts. 27.

<sup>1566</sup> UNSC, UNSC Verbatim Record (20 March 2008) UN Doc S/PV.5858.

<sup>1567</sup> On developments in the substance and scope of peacekeeping mandates, see generally V Holt and T Berkman, *The Impossible Mandate? Military Preparedness, The Responsibility to Protect and Modern Peace*

supportive tasks entailed detailing and seizing weapons in order to help to monitor the arms sanctions imposed by the UNSC. In contrast, the peacekeeping mission in South Sudan entailed supporting development (e.g. providing the government with advice on the establishment of State infrastructure and policy<sup>1569</sup>) because it was a newly established State.

The second trend is that the general objective of providing assistance may vary. In cases where the recipients of the assistance are newly formed authorities, the focus may be upon developing their national capacity to protect populations from RtoP crimes and, therefore, to function as effective primary RtoP bearers. Thus, in Libya military assistance to the rebels by third States, such as the UK<sup>1570</sup> and France,<sup>1571</sup> took the form of arms and police equipment. In cases where national leadership remains uncertain, assistance may focus upon establishing an appropriate authority. For example, mediation assistance was given in Kenya to address the contested national elections results and establish a coalition government.<sup>1572</sup> In cases where the recipients of the assistance are challenged by armed groups, the objective of the assistance may be providing immediate protection to populations and/or equipping the recipients of the assistance to bear primary RtoP effectively. To achieve the former, assistance may involve mandating peacekeepers to protect civilians through force if necessary.<sup>1573</sup> To achieve the latter, assistance may involve mandating peacekeepers to support the disarmament of armed groups, the establishment of national human rights policies and efforts to ensure that humanitarian agencies have unimpeded access to populations.<sup>1574</sup>

On the one hand, the abovementioned trends regarding the types of assistance measures which can be used suggest that secondary RtoP's assistance component is fundamental to the international community having a role in preventing RtoP crimes from arising or recurring. However, examination of relevant practice suggests that using assistance measures to prevent RtoP crimes has been of variable effectiveness. To this effect, it should be recalled that RtoP crimes have arisen in States where a peacekeeping mission is serving. The UNOCI

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*Operations* (The Henry L. Stimson Centre, Washington D. C. 2006) and J Lie, *Protection of Civilians, The Responsibility to Protect and Peace Operations* (Norwegian Centre for International Affairs, Oslo 2008).

<sup>1568</sup> UNSC Res 1584 (2005) UN Doc S/RES/1584. (UNSC Res 1584).

<sup>1569</sup> UNSC Res 1996 (2011) UN Doc S/RES/1996. (UNSC Res 1996).

<sup>1570</sup> UK FCO, 'UK Provides Equipment' (n 1473).

<sup>1571</sup> 'Libya: Russia Denies French Arms Drop to Libyan Rebels' (n 1472).

<sup>1572</sup> On the mediation efforts in Kenya see Human Rights Watch, 'Ballots to Bullets: Organised Political Violence and Kenya's Crisis of Governance' (2008) Human Rights Watch Report 20 (1) (A), 67-69

<<http://www.hrw.org/reports/2008/kenya0308/index.htm>> accessed 16 November 2011 and at in M Preston-McGhie and S Sharma, "Kenya" in J Genser and I Cotler, *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time* (OUP, Oxford 2012) 287-295.

<sup>1573</sup> For example, the UNSC authorised peacekeepers in the Côte d'Ivoire to 'use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence'. UNSC Res 1975 (2011) UN Doc S/RES/1975 at para 6 (UNSC Res 1975).

<sup>1574</sup> For example, these objectives were incorporated into the mandates of the peacekeeping missions in the Côte d'Ivoire, Darfur and South Sudan. See respectively, UNSC Res 1795 (2008) UN Doc S/RES/1765, paras 4 and 11 [Côte d'Ivoire]; UNSC Res 1769 (2007) UN Doc S/RES/1769, paras 9 and 15 (a) (i) and UNSC Res 2003 (2011) UN Doc S/RES/2003, paras 3, 5 and 21 [Darfur]; UNSC Res 1996 (n 1569), para 3 (b) (iv) [South Sudan].

mission in the Côte d'Ivoire is a good illustration. Despite being deployed in 2005,<sup>1575</sup> national elections led to tensions increasing. Whilst the UNSC expanded the peacekeepers on the ground,<sup>1576</sup> RtoP crimes nevertheless emerged. This suggests that even the most proactive assistance measures can fail to prevent RtoP crimes. Arguably, one explanation for this, at least in terms of military assistance, is that the wide ranging mandates of peacekeepers can embroil them in so many activities that they ultimately become overstretched and unable to protect civilians effectively.<sup>1577</sup> Accordingly, whilst consensual measures can be more politically acceptable to States, the international community requires redress to a wider range of means if it is to have an effective role in protecting populations. As the UNSG eloquently states, each RtoP pillar 'would make little sense standing alone'.<sup>1578</sup>

### 3 The 'Timely and Decisive Response'<sup>1579</sup> Pillar

The general consensus is that secondary RtoP's Timely and Decisive Response Pillar can be discharged through either peaceful or non-peaceful measures.<sup>1580</sup> Each set of responsive measures merit individual consideration, not least because they each give rise to competing doctrinal and policy considerations.

#### 3.1 Peaceful Responsive Measures

The Outcome Document provides that the 'international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect

<sup>1575</sup> UNSC Res 1584 (n 1568).

<sup>1576</sup> See e.g. UNSC Res 1942 (2010) UN Doc S/RES/1942.

<sup>1577</sup> Waal has put forward a similar argument. See A De Waal, 'Darfur and the Failure of the Responsibility to Protect' (2007) 83 (6) *International Affairs* 1039, 1050-51. Tsagourias also takes this view, arguing that tasking peacekeepers with wide-ranging protection activities can place excessive demands upon them and therefore amount to more 'peace enforcement than to peacekeeping'. N Tsagourias, 'Consent, Neutrality / Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension' (2007) 11 (3) *Journal of Conflict and Security Law* 465, 482. See further on the overlap between peacekeeping, peace enforcement and RtoP, Gerber R, 'Peacekeeping and the Responsibility to Protect' (*UN-USA, The Interdependent*, Washington D.C, 29 May 2012) <<http://theinterdependent.com/peacekeeping/article/peacekeeping-and-the-responsibility-to-protect>> accessed 7 July 2012. Some commentators suggest that the effectiveness of wide ranging mandates can be further undermined by the fact that peacekeepers often suffer from inadequate or inappropriate training. See W Pace, N Deller and S Chhatpar, 'Realising the Responsibility to Protect in Emerging and Acute Crises: A Civil Society Proposal for the United Nations' in Cooper and Kohler (n 1438), 238. On additional factors which could undermine the effectiveness of peacekeepers, see M Odello, 'Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers' (2010) 15 (2) *Journal of Conflict and Security Law* 347, 380.

<sup>1578</sup> UNSG Report 2012, Timely and Decisive Response (n 1350), 4.

<sup>1579</sup> Outcome Document (n 1336), para 139.

<sup>1580</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 22.

populations from genocide, war crimes, ethnic cleansing and crimes against humanity’.<sup>1581</sup> The UNSG’s 2009 Report interprets this to cover a range of measures at the international community’s disposal, including (i) the deployment of fact-finding missions;<sup>1582</sup> (ii) referral of a situation for inclusion on the UNSC’s agenda;<sup>1583</sup> (iii) consideration of a situation in the UNGA;<sup>1584</sup> and (iv) using diplomacy to remind national authorities of their primary RtoP duty and that individual criminal accountability can arise for the perpetration of RtoP crimes.<sup>1585</sup>

Again, a second layer of relevant practice develops upon the more specific aspects of the general means of discharging peaceful responsive measures. This second form of practice has helped to contour three significant issues, specifically (i) what “peaceful” responsive measures are understood to mean; (ii) the types of peaceful responsive measures that can be used; and (iii) the varying nature of these measures.

### 3.1.1 The Meaning of “Peaceful”

States have adopted two different interpretations to the meaning of “peaceful” responsive measures. The first approach is adopted by European States like Sweden,<sup>1586</sup> Italy,<sup>1587</sup> Hungary<sup>1588</sup> and also the European Union.<sup>1589</sup> This approach classifies “peaceful” responsive measures broadly, encompassing measures which (i) fall short of the most coercive and intrusive forms of international action, such as collective sanctions and the use of armed force; and (ii) require somewhat more intrusion than assistance measures which “help” and “encourage” the State to fulfil primary RtoP because they can, for example, involve international assessments of whether national authorities are implicated in the perpetration of RtoP crimes. Thus, under the first approach peaceful responsive measures are considered to include measures which can ‘help to protect’<sup>1590</sup> the population by (i) aiding the State to bring a situation to an end; *and* (ii) involve the international community taking direct action against the State. The second approach is adopted by Russia<sup>1591</sup> and China<sup>1592</sup> and also Latin

<sup>1581</sup> Outcome Document (n 1336), para 139.

<sup>1582</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 23.

<sup>1583</sup> *ibid.*

<sup>1584</sup> *ibid.*

<sup>1585</sup> *ibid.*

<sup>1586</sup> Statement of the Representative of Sweden (*on behalf of the Nordic Countries*) in UN OHCHR, ‘Human Rights Council Opens Fourth Special Session on Syria’ (1 June 2012) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12212&LangID=E>> accessed 7 July 2012. (UN OHCHR, ‘Fourth Special Session on Syria’).

<sup>1587</sup> Statement of the Representative of Italy, *ibid.*

<sup>1588</sup> Statement of the Representative of Hungary, *ibid.*

<sup>1589</sup> Statement of the Representative of Denmark (*on behalf of the European Union*), *ibid.*

<sup>1590</sup> Outcome Document (n 1336), para 139.

<sup>1591</sup> Statement of the Representative of the Russian Federation in UN OHCHR, ‘Human Rights Council Requests Commission of Inquiry to Conduct a Special Inquiry in the Events in El Houleh’ (1 June 2012) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12215&LangID=E>> accessed 7 July



American States like Venezuela<sup>1593</sup> and Cuba.<sup>1594</sup> This approach is quite narrow, with appropriate peaceful measures being limited to responsive measures which ‘help to protect’<sup>1595</sup> populations by *helping the State* to meet primary RtoP and resolve the situation. This writer would therefore argue that the divide in State views regarding the character of peaceful responsive measures seems to turn on the meaning which should be given to “helping to protect” populations and “peaceful”. The extent of the divide in State views on the character of peaceful responsive measures, the extent to which this divide can impact upon secondary RtoP’s discharge and the reasons which underscore the division between States are all issues which most clearly come through in the case studies of Libya and Syria.

In relation to Libya, consideration should be given to State responses to the UNHRC’s suspension of Libya’s membership for failing to discharge its human rights obligations and protect its populations effectively.<sup>1596</sup> Several representatives unequivocally supported this action.<sup>1597</sup> States like Russia and China were more cautious, noting that the action was an exception and should not set precedents for the UNHRC’s future responses.<sup>1598</sup> With regard to Syria, reference can be made to the opposing positions taken to what constitutes a “peaceful” response during UNHRC debate on the situation. On the one hand, some States<sup>1599</sup> supported the adoption of the June UNHRC Resolution.<sup>1600</sup> These States considered that condemning the ongoing violence and Syrian authorities’ lack of cooperation with the international community was an appropriate UNHRC response. In contrast, Russia urged States’ supporting a ‘peaceful settlement’<sup>1601</sup> of the situation in Syria to reject the UNHRC Resolution. The flipside of rejecting a Resolution in order to ensure a ‘peaceful

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2012. (UN OHCHR, ‘Human Rights Council Requests Commission of Inquiry to Conduct a Special Inquiry in the Events in El Houleh’).

<sup>1592</sup> Statement of the Representative of *China* in UN OHCHR, ‘Fourth Special Session on Syria’ (n 1586).

<sup>1593</sup> Statement of the Representative of *Venezuela*, *ibid*.

<sup>1594</sup> Statement of the Representative of *Cuba* in UN OHCHR, ‘Human Rights Council Requests Commission of Inquiry to Conduct a Special Inquiry in the Events in El Houleh’ (n 1591).

<sup>1595</sup> Outcome Document (n 1336), para 139.

<sup>1596</sup> See UN Press Release, ‘Human Rights Council Passes Resolution on Libya in Special Session’ (25 February 2011) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10768&LangID=E>> accessed 14 November 2011 (UN Press Release, ‘Human Rights Council Passes Resolution on Libya in Special Session’); UN Press Release, ‘Human Rights Council Debates Situation of Human Rights in Libya’ (25 February 2011) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10766&LangID=E>> accessed 14 November 2011 (UN Press Release, ‘Human Rights Council Debates Situation of Human Rights in Libya’); UN Press Release, ‘General Assembly Suspends Libya from Human Rights Council’ (1 March 2011) UN Doc GA/11050 <<http://www.un.org/News/Press/docs/2011/ga11050.doc.htm>> accessed 14 November 2011. (UN Press Release, ‘General Assembly Suspends Libya from Human Rights Council’).

<sup>1597</sup> See especially, Statements of the Representatives of *Hungary (on behalf of the European Union)*, *The Maldives* and *Costa Rica* in UN Press Release, ‘General Assembly Suspends Libya from Human Rights Council’, *ibid*.

<sup>1598</sup> Statements of the Representatives of the *Russian Federation* and *China*, *ibid*.

<sup>1599</sup> See the meeting record in UN OHCHR, ‘Fourth Special Session on Syria’ (n 1586).

<sup>1600</sup> UNHRC Res S-19/1, ‘The Deteriorating Situation of Human Rights in the Syrian Arab Republic, and the Recent Killings in El-Houleh’ (4 June 2012) UN Doc A/HRC/RES/S-19/1. (UNHRC Res, S-19/1).

<sup>1601</sup> Statement of the Representative of the *Russian Federation* in UN OHCHR, ‘Human Rights Council Requests Commission of Inquiry to Conduct a Special Inquiry in the Events in El Houleh’ (n 1591).

settlement'<sup>1602</sup> is that the Resolution at issue is not “peaceful”. Russia seemed to be concerned that the Resolution was biased because it does not explicitly refer to the acts of “terrorism” being perpetrated against regime members/supporters.<sup>1603</sup> Venezuela<sup>1604</sup> and Cuba<sup>1605</sup> echoed this view, denouncing the Resolution and voted against its adoption because they considered that it was one-sided and interference in Syria’s internal affairs.

There are two significant elements to the above practice. First, the divide in State views seems to be at least partly influenced by reservations over blurring the distinction between a “peaceful” and “non-peaceful” response. For example, Russia notably (i) qualified its acceptance of Libya’s suspension as a *sui generis* response;<sup>1606</sup> (ii) condemned the UNHRC for being addressed by the former UN Envoy on Syria;<sup>1607</sup> and (iii) criticised the UNHRC’s June Resolution for being inconsistent with the more objective position adopted in UNSC Presidential Statements on the Syrian situation.<sup>1608</sup> Each of these responses suggests that Russia is apprehensive over the international community’s capacity to undertake “peaceful” responses through other organs, such as the UNHRC, when the UNSC fails to act effectively, thereby undermining the UNSC’s discretion over whether to respond to a particular situation. This relates to the second issue, namely that States’ understanding of “peaceful” responsive measures seems to correspond with their views on when particular secondary RtoP measures are activated.<sup>1609</sup> Russia seems to consider that measures which entail any non-peaceful element should be authorised only when the UNSC considers that there is no prospect for peaceful means to ensure populations’ protection from RtoP crimes. Russia argued before the UNSC that it deems ‘unacceptable the threat of an ultimatum and sanctions against the Syrian authorities. Such an approach contravenes the principle of a peaceful settlement of the crises.’<sup>1610</sup> Arguably, this suggests that Russia considers threatening sanctions against the Syrian regime violates the duty to resolve disputes peacefully contained in Chapter VI of the UN Charter. The difficulty with conflating the duty to resolve disputes peacefully and the meaning of “peaceful” means is that it suggests that there is a duty to exhaust all “peaceful” means before non-peaceful means can be used and, when used, by the UNSC. In effect, Russia’s standpoint suggests that some States could try to conflate secondary RtoP’s peaceful measures component with the duty to resolve disputes peacefully in order to prevent

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<sup>1602</sup> *ibid.*

<sup>1603</sup> *ibid.*

<sup>1604</sup> Statement of the Representative of *Venezuela* in UN OHCHR, ‘Fourth Special Session on Syria’ (n 1586).

<sup>1605</sup> Statement of the Representative of *Cuba* in UN OHCHR, ‘Human Rights Council Requests Commission of Inquiry to Conduct a Special Inquiry in the Events in El Houleh’ (n 1591 ).

<sup>1606</sup> Statement of the Representative of the *Russian Federation* in UN Press Release, ‘General Assembly Suspends Libya from Human Rights Council’ (n 1596).

<sup>1607</sup> Statement of the Representative of the *Russian Federation* in UN OHCHR, ‘Human Rights Council Requests Commission of Inquiry to Conduct a Special Inquiry in the Events in El Houleh’ (n 1591).

<sup>1608</sup> *ibid.*

<sup>1609</sup> This issue was discussed at length in chapter four.

<sup>1610</sup> Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627.

the international community undertaking a more robust response.

### 3.1.2 Types of Peaceful Responsive Measures

The Outcome Document explicitly links secondary RtoP's peaceful responsive component to Chapters VI and VIII of the UN Charter.<sup>1611</sup> This suggests that Chapters VI and VIII can be drawn upon to determine what responsive measures can be considered as "peaceful" in the context of secondary RtoP. Examination of these sections of the UN Charter suggests that two peaceful measures which the international community could utilise are (i) to refer a situation to be considered for inclusion on the UNSC's agenda (Chapter VI, UN Charter); and (ii) for regional organisations to use their own pacific mechanisms to 'help to protect populations'<sup>1612</sup> (Chapter VIII, UN Charter).

Practice suggests that the Outcome Document's reference to "other peaceful means" has been interpreted quite widely, encompassing the deployment of observer missions to monitor compliance with peace plans and fact-finding missions to assess the situation on the ground. Although various UN organs have the power to deploy a fact-finding mission,<sup>1613</sup> the HRC has shown a particular willingness to do so in RtoP cases. Whilst the Mission to Gaza invoked RtoP in its findings,<sup>1614</sup> the Mission to Darfur used RtoP as a framework for its investigation and recommendations.<sup>1615</sup>

The Outcome Document's reference to the use of peaceful diplomatic responsive measures has also been interpreted quite broadly in practice. The use of mediation to try to bring the situations in Kenya and Syria to a peaceful end showed the way in which diplomatic measures can be *direct*, involving a series of meetings between State officials and the Representative of the African Union<sup>1616</sup> (in Kenya) and Joint Representative of the Arab League and UN<sup>1617</sup> (in Syria). Diplomatic peaceful measures may also be *impartial* with regard to who is accountable for the harm sustained by the population. This was the case in the UNSC's Presidential Statements on Syria which, mainly at the bequest of Russia and China, avoid attaching blame to any particular party and call for a cessation of violence in

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<sup>1611</sup> Outcome Document (n 1336), para 139.

<sup>1612</sup> *ibid.*

<sup>1613</sup> For example, the UNSC, UNHRC and the UNGA. UNSG 2009 Report, Implementing RtoP (n 1342), 23.

<sup>1614</sup> UNHRC, 'Report of the United Nations Fact Finding Mission on the Gaza Conflict' (15 September 2009) UN Doc A/HRC/12/48, 531.

<sup>1615</sup> See generally UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur' (9 March 2007) UN Doc A/HRC/4/80. (UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur').

<sup>1616</sup> On the mediation efforts in Kenya see e.g. Preston-McGhie and Sharma (n 1572), 287-295.

<sup>1617</sup> On the mediation efforts in Syria, see A Bellamy and T Dunne, 'Syria: RtoP on Trial' (*Lowy Institute for International Policy: The Interpreter*, 5 June 2012) <<http://www.lowyinterpreter.org/post/2012/06/05/Syria-RtoP-on-trial.aspx>> accessed 14 July 2012 and J Traub, 'Enough Talking Kofi' (*Foreign Policy*, 25 May 2012) <[http://www.foreignpolicy.com/articles/2012/05/25/enough\\_talking\\_kofi?page=0,0](http://www.foreignpolicy.com/articles/2012/05/25/enough_talking_kofi?page=0,0)> accessed 16 June 2012.

the State in general.<sup>1618</sup>

Practice also highlights that the discharge of peaceful responsive means is *context-dependent*. When the discharge envisages access to the State's territory, a wide range of actors can impede its effectiveness. Fact-finding missions<sup>1619</sup> can be *denied access* to the State territory, thereby requiring the Mission's personnel to draw upon wider evidential techniques (e.g. interviewing refugees<sup>1620</sup>) in order to report on the situation on the ground. The case studies of Libya and Syria illustrate that, at other times, fact-finding/observer missions cannot fulfil their mandate due to the security situation on the ground or constraints on their access to certain areas by State authorities.<sup>1621</sup>

Wider policy issues can also impede diplomatic peaceful responsive measures' effectiveness. The fundamental difficulty here is garnishing the political will *to take* the requisite form of diplomatic response. Russia<sup>1622</sup> and China's<sup>1623</sup> emphasis on impartiality in relation to events in Syria prevents the UNSC from strongly denouncing the Syrian authorities' role in the RtoP crimes committed therein. Efforts have been made to circumvent this somewhat by securing the UNGA<sup>1624</sup> and UNHRC's<sup>1625</sup> condemnation of the situation. However, an unequivocal diplomatic response from the UNSC would carry particular weight

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<sup>1618</sup> See e.g. UNSC Presidential Statement, 'The Situation in the Middle East' 2011 (n 1497).

<sup>1619</sup> For example in Darfur and Syria. On the issue of non-access to the territory of the State, see the Statement of the Representative of *Sudan* to the UNHRC in UN Press Release, 'Human Rights Council Discusses Report of High-Level Mission on Situation of Human Rights in Darfur' (16 March 2007) UN Doc HRC/07/12 <<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/E6DF2E2811EABFA3C12572A000717B7E?opendocument>> accessed 12 November 2011. For an overview of the discussions between the Syrian government and the Human Rights Council on the issue of access to the territory of the State, see UNHRC, 'Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic' (n 1476), 3-4.

<sup>1620</sup> See as examples UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur' (n 1615), 2-3 and UNHRC, 'Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic', *ibid*, 3.

<sup>1621</sup> On Libya, see Report of the International Commission of Inquiry in Libya (n 1471), 16-17 [outlining the challenges encountered by the Commission when trying to collect information because of the security situation on the ground]. On Syria, see the circumstances surrounding the suspension of the Arab League's fact-finding mission and the temporary suspension of the UN Observer Mission in Syria in 'Arab League Suspends Syria Mission' *The Guardian* (London, 28 January 2012) <<http://www.guardian.co.uk/world/2012/jan/28/arab-league-suspends-syria-monitoring>> accessed 12 July 2012 [outlining the security circumstances which surrounding the suspension of the Arab League's fact-finding mission]; 'Increasing Bloodshed Leads to Suspension of UN Observer Mission in Syria' (*Russia Today*, Moscow, 16 June 2012) <<http://www.rt.com/news/un-mission-escalating-violence-987/>> accessed 12 July 2012 and 'Syria UN Observer Mission Must Be 'Reconfigured' - Mood' (*BBC News*, London, 5 July 2012) <<http://www.bbc.co.uk/news/world-middle-east-18721577>> accessed 12 July 2012 [both detailing the impediments to the Observer's movement in Syria, including when trying to verify the facts surrounding specific "massacres" of civilians].

<sup>1622</sup> See e.g. Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627

<sup>1623</sup> See e.g. Statement of the Representative of *China*, *ibid*.

<sup>1624</sup> UN Press Release, 'Third Committee Approves Resolution Condemning Human Rights Violations in Syria' (22 November 2011) UN Doc GA/SHC/4033 <<http://www.un.org/News/Press/docs/2011/gashc4033.doc.htm>> accessed 5 January 2012 (UN Press Release, 'Third Committee Approves Resolution Condemning Human Rights Violations in Syria') and UN Press Release, 'General Assembly Adopts more than Sixty Resolutions Recommended by Third Committee Including Text Condemning Grave, Systematic Human Rights Violations in Syria' (19 December 2011) UN Doc GA/11198 <<http://www.un.org/News/Press/docs/2011/ga11198.doc.htm>> accessed 5 January 2012. (UN Press Release, 'General Assembly Adopts more than Sixty Resolutions Recommended by Third Committee Including Text Condemning Grave, Systematic Human Rights Violations in Syria').

<sup>1625</sup> For instance, UNHRC Res S-16/1 (n 1484) and UNHRC Res S-19/1 (n 1600).

because it illustrates the discontentment of the organ charged with the primary authority to authorise collective sanctions and the use of armed force.<sup>1626</sup> However, this requires the P5 to set aside their own interests in maintaining strict adherence to non-interference in States' internal affairs and, furthermore, to avoid labelling other States' push for strong diplomatic action as 'blackmail'<sup>1627</sup> of the UNSC.

Strauss<sup>1628</sup> points to further impediments to utilising peaceful responsive measures. He argues that the HRC's mission on the situation of human rights in Darfur illustrated that the HRC lacks the capacity to translate its fact-finding missions' recommendations into practice.<sup>1629</sup> For example, the HRC cannot independently sanction a State for failing to adopt such recommendations.<sup>1630</sup> There is some merit to this argument. In Darfur, the fact-finding mission's recommendations were merely taken note of by the HRC.<sup>1631</sup> However, the HRC's unprecedented suspension of Libya for harming its populations<sup>1632</sup> raises the possibility that similar diplomatic sanctions may be used in the future in order to overcome the HRC's incapacity to independently sanction States which fail to implement a fact-finding mission's recommendations, at least when the gravity and scale of the harm sustained by the population merits this response. Of course, this would depend on there being sufficient political will among the HRC to suspend a State's membership.

### 3.1.3 The Nature of Peaceful Responsive Measures

Examination of relevant practice suggests that secondary RtoP's peaceful responsive measures entail a *multi-faceted* nature. When fact-finding or observer missions are deployed, peaceful responsive measures can have an *investigative and/or monitoring* nature.<sup>1633</sup> They can establish whether the situation on the ground warrants, or has come to warrant in the

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<sup>1626</sup> Arbour makes a similar argument, opining that the P5 should use their "influence" accordingly when dealing with cases involving RtoP crimes. L Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 *Review of International Studies* 445, 453-454.

<sup>1627</sup> As Russia did with regard to the push from States like the United Kingdom for a reference to Chapter VII action if the Syrian government did not comply with the ceasefire within ten days of the date of the draft Resolution. See, J Heintz, 'Syria Crisis: Russia Accuses West of Blackmail on New Security Council Resolution' (*Huffington Post World*, 16 July 2012) <[http://www.huffingtonpost.com/2012/07/16/syria-crisis-russia-blackmail\\_n\\_1676235.html](http://www.huffingtonpost.com/2012/07/16/syria-crisis-russia-blackmail_n_1676235.html)> accessed 20 July 2012.

<sup>1628</sup> E Strauss, *The Emperor's New Clothes? The United Nations and the Implementation of the Responsibility to Protect* (Nomos, Baden Baden 2009).

<sup>1629</sup> Strauss notes that 'the Human Rights Council proved to be too weak as a body to carry through the full implementation of its recommendations. In addition to unity it lacked any effective sanctions it could have applied', *ibid*, 68.

<sup>1630</sup> *ibid*.

<sup>1631</sup> *ibid*, 65.

<sup>1632</sup> UN Press Release, 'Human Rights Council Passes Resolution on Libya in Special Session' (n 1596); UN Press Release, 'Human Rights Council Debates Situation of Human Rights in Libya' (n 1596); UN Press Release, 'General Assembly Suspends Libya from Human Rights Council' (n 1596).

<sup>1633</sup> The Secretary-General seems to instead draw a distinction between investigation and a response, despite peaceful means (e.g. fact-finding missions) being considered as a responsive measures in their own right. See UNSG 2009 Report, *Implementing RtoP* (n 1342), 23.

course of the missions' mandate, the application of (i) further peaceful responsive measures (e.g. diplomatic denouncement of harm to population which has been verified by observer or fact-finding mission);<sup>1634</sup> or (ii) non-peaceful responsive measures (e.g. collective sanctions).<sup>1635</sup>

Peaceful responsive measures can also be *symbolic* of the international community's political will to apply 'tougher measures'<sup>1636</sup> in a particular case. The application of these measures clearly denotes to that the international community has begun to discharge secondary RtoP. To the State subject to the measure, this highlights that the potentially 'slippery-slope'<sup>1637</sup> toward armed intervention has now commenced. In some cases this may help to deter the perpetration of RtoP crimes.

When the UNSC fails to authorise non-peaceful responsive measures, peaceful responsive measures can also represent a *stopgap*. Notably, peaceful responsive measures are been increasingly relied upon in cases where the UNSC does not act effectively. A good example is the June HRC Resolution. This challenged the very neutral language of relevant UNSC Presidential Statements by adopting a far less impartial approach to the issue of who was responsible for the majority of harm sustained by the Syrian population.<sup>1638</sup>

### 3.2 Non-Peaceful Responsive Measures

The Outcome Document does not explicitly refer to the type of non-peaceful responsive measures which can be discharged. However, it does provide that the international community is:

'[P]repared to take *collective action*, in a timely and decisive manner, *through the Security Council, in accordance with the Charter, including Chapter VII*, on a *case-by-case basis* and in *cooperation* with relevant regional organisations *as appropriate*'.<sup>1639</sup>

This provision suggests that the international community can use non-peaceful responsive measures which conform to the UN Charter, such as Chapter VII enforcement measures. It

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<sup>1634</sup> For example, denouncement of the El-Houleh "massacre" in Syria. UNHRC Res S-19/1 (n 1600).

<sup>1635</sup> See e.g. UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur' (n 1615), 25.

<sup>1636</sup> UNSG 2009 Report, Implementing RtoP (n 1342) 25.

<sup>1637</sup> Alvarez, 'The Schizophrenias of RtoP' (n 1360).

<sup>1638</sup> The relevant extract of the Resolution condemns: 'the killings, confirmed by United Nations observers, of dozens of men, women and children and the wounding of hundreds more in the village of El-Houleh, near Homs, in attacks that involved the wanton killing of civilians by shooting at close range and by severe physical abuse by pro-regime elements *and a series of Government artillery and tank shellings of a residential neighbourhood*, and reiterating that all violence in all its forms by all parties must cease', emphasis added. UNHRC Res S-19/1 (n 1600), para 2.

<sup>1639</sup> Outcome Document (n 1336), para 139.

also suggests that there are some general characteristics of non-peaceful responsive measures under secondary RtoP. First, the initial italicised term denotes that non-peaceful responsive measures should be *collectively discharged*.<sup>1640</sup> Second, the express provision for collective action to be taken ‘through the Security Council, in accordance with the Charter’<sup>1641</sup> tends to affirm the general prohibition on armed force, specifically that this can only be deviated from when the armed force is (i) authorised by the UNSC;<sup>1642</sup> or (ii) undertaken as part of a State’s right to self-defence.<sup>1643</sup> Third, the provision for collective action to be undertaken ‘in cooperation with regional organisations, as appropriate’<sup>1644</sup> sustains the requirement in Articles 53 of Chapter VIII of the UN Charter, that is that enforcement action undertaken by regional should be authorised by the UNSC.<sup>1645</sup> Finally, the Outcome Document criteria for discharging secondary RtoP through collective means are notably framed in the *present tense* (i.e. ‘national authorities *are* manifestly *failing* to protect populations’).<sup>1646</sup> This suggests that a finding of a State’s manifest failure to protect populations from RtoP crimes should be based on the present circumstances, not past events. Arguably, this clarifies *when* UNSC authorisation for the use of non-peaceful measures should be granted, including the use of armed force. The terms suggest that UNSC authorisation should be given at the same time that populations’ require protection from RtoP crimes and national authorities are manifestly failing to provide this. This tends to undermine Bellamy’s<sup>1647</sup> argument that the international community could “revive”<sup>1648</sup> an earlier UNSC authorisation for non-peaceful responses for the protection of a particular population, in order to legitimise armed force which was being used at a later date to discharge secondary RtoP.

Subsequent practice has elaborated upon, or involved discussion of, the more specific aspects of the discharge of secondary RtoP’s non-peaceful responsive component, including (i) the scope and substance of the decision making process on the authorisation of these measures; (ii) what steps can be taken when the basic requirements for the discharge of these measures cannot be met in a particular case; and (iii) the acceptable outcomes of discharging secondary RtoP through non-peaceful means. This process of clarification has enabled a more robust understanding of which aspects of discharging non-peaceful measures continue to cause controversy and why they cause this.

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<sup>1640</sup> *ibid.*

<sup>1641</sup> *ibid.*

<sup>1642</sup> United Nations, *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 42. (UN Charter).

<sup>1643</sup> UN Charter, *ibid.*, art 51. The legal significance of this overlap is examined in detail in chapter six.

<sup>1644</sup> Outcome Document (n 1336), para 139.

<sup>1645</sup> UN Charter (n 1643), art 53 (1).

<sup>1646</sup> Outcome Document (n 1336), para 139.

<sup>1647</sup> Bellamy, *The Global Effort to End Mass Atrocities* (n 1446).

<sup>1648</sup> *ibid.*, 91. The merits of Bellamy’s argument on the possibility to rely on revived Security Council authorisation are considered at length in the next chapter. For an overview of the role of the “revival argument” in the Iraq intervention see C Gray, *International Law and the Use of Force* (3rd ed, OUP, Oxford 2008) 348–66.

### 3.2.1 The Scope and Substance of the Decision Making Process

Unlike the ICISS Report,<sup>1649</sup> the Outcome Document does not expressly recommend that decisions over the use of armed force conform to Just War-type criteria.<sup>1650</sup> One reason for this could be that incorporating such criteria could have suggested that secondary RtoP's discharge *can* and *should* involve the use of armed force. Furthermore, as the criteria focus largely upon ensuring that the use of armed force is undertaken for humanitarian purposes, an explicit reference to the criteria could have compounded some States' concerns that secondary RtoP was essentially an attempt bring humanitarian intervention in through the back door of the UN, despite several States' deep seated political and legal concerns regarding it.

Nevertheless, this writer would argue that the Outcome Document alludes to some of the criteria and, therefore, that the criteria were not entirely abandoned in the RtoP framework which emerged at the World Summit. For example, qualifying armed force to instances where national authorities are manifestly failing to protect their populations<sup>1651</sup> overlaps with requiring that armed force has a 'just cause'<sup>1652</sup> and is undertaken with the 'right intention'<sup>1653</sup> of protecting populations. Furthermore, requiring non-peaceful responses to be undertaken 'through the Security Council, in accordance with the Charter'<sup>1654</sup> suggests that the use of force should satisfy the requirement of 'right authority' (i.e. by being authorised by the UNSC).

Examination of the decision to use armed force to protect Libyan civilians suggests that, whilst the Outcome Document does not require the criteria to be followed, they may still be drawn upon in practice. Aside from the fact that the civilian protection mandate of the armed force in Libya reflects the criteria of just cause and right intention,<sup>1655</sup> it is notable that the UK (a chief actor in the use of armed force in Libya) explicitly referred to the criteria when justifying its actions to Parliament.<sup>1656</sup> The fact that the use of armed force in Libya assumed

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<sup>1649</sup> The criteria were outlined in chapter one. ICISS Report (n 1359), 32-37 and, on the "right authority" requirement, 47-55.

<sup>1650</sup> Although the former Secretary-General, Kofi Annan, suggested that States consider including an express reference to the criteria within the Outcome Document, this was not adopted. Report of the UNSG, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (March 2005) UN Doc A/59/2005, 33. (Report of the UNSG, 'In Larger Freedom').

<sup>1651</sup> This point was also made by Sharma. See Sharma, 'Toward a Global Responsibility to Protect: Setbacks on the Path to Implementation' (n 1442), 123. She further argues that 'contrary to certain critics, the Outcome Document's decision to dispense with elaborating a list of criteria, and electing to treat prospective interventions on a "case-by-case basis," conforms to the casuistry of classical just war thought'. Sharma, 134.

<sup>1652</sup> Sharma also notes the overlap between these Outcome Document provisions and the just cause criteria, *ibid*, 134. On the just cause requirement, see ICISS Report (n 1359), 32-34.

<sup>1653</sup> On this requirement see ICISS Report, *ibid*, 35-36.

<sup>1654</sup> Outcome Document (n 1336), para 139.

<sup>1655</sup> UNSC Res 1973 (n 1484), para 4.

<sup>1656</sup> For example the opposition leader, Ed Miliband, invoked the ICISS Report's proposed criteria on the use of armed force at the House of Commons debate on UN Security Council Resolution 1973 (2011). Statement of Ed Miliband, HC Deb 21 March 2011, vol 525, col 716. See also, 'David Cameron: Libya Action is Necessary, Legal and Right' *The Telegraph* (London, 20 March 2011)



the nature of enforcing a No Fly Zone further suggests that the use of armed force to discharge secondary RtoP will, at least sometimes, comply with the requirement for the means of using force to be *proportionate to the situation at hand*.<sup>1657</sup> Libya suggests that, in practice, proportionate means may be determined by taking into account the views of the population and relevant regional organisations. This approach comes through (i) in State<sup>1658</sup> references to the fact that the Arab League Resolution had specifically requested the UNSC to authorise armed force in the form of a No Fly Zone; and (ii) Resolution 1973's exclusion of 'a foreign occupation force of any form on any part of Libyan territory'<sup>1659</sup>, echoing the NTC's<sup>1660</sup> request for armed force to not include the deployment of land forces.

Libya also raises the possibility that present approaches to decision making on the use of armed force may actually be more stringent than they would have been had the criteria been adopted. The ICISS clarified that the criteria for using armed force as a "last resort" did not require all less coercive measures to be first exhausted. However, despite the UNSG's 2009 Report stressing that responsive measures can be discharged non-incremental,<sup>1661</sup> responses to the situation in Libya were incremental. The international community steadily increased the severity of the measures used. The response began with diplomatic measures.<sup>1662</sup> When international condemnation failed to persuade the Libyan authorities to protect their population, the UNSC strengthened its response by referring the situation to the ICC and authorising the application of targeted sanctions.<sup>1663</sup> Based on the view that these measures had failed to deter the Libyan authorities from causing any further harm to its population, the international response culminated with the UNSC authorising the use of armed force.<sup>1664</sup> Admittedly, an incremental approach helps distance secondary RtoP from the wider concept of humanitarian intervention by suggesting that armed force will not be the first measure

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<<http://www.telegraph.co.uk/news/worldnews/africaandindianocan/libya/8393478/David-Cameron-Libya-action-is-necessary-legal-and-right.html>> accessed 10 March 2012.

<sup>1657</sup> On the establishment of a No Fly Zone in Libya, see UNSC Res 1973 (n 1484), paras 6-12. On the requirement of proportionality see ICISS Report (n 1359), 37.

<sup>1658</sup> See Statements of the Representatives of *Lebanon*, the *United Kingdom*, *Colombia* and *China* to the UNSC, UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498.

<sup>1659</sup> UNSC Res 1973 (n 1484), para 4.

<sup>1660</sup> '[W]e request from the international community to fulfil its obligations to protect the Libyan people from any further genocide and crimes against humanity without any direct military intervention on Libyan soil'. The Transitional Interim National Council of Libya, 'Founding Statement' (5 March 2011) <<http://ntclibya.org/english/founding-statement-of-the-interim-transitional-national-council/>> accessed 25 March 2011.

<sup>1661</sup> This was also recommended by the UNSG: 'In a rapidly unfolding emergency situation, the United Nations, regional, sub-regional and national decision makers must remain focused on saving lives through "timely and decisive" action not on following arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results' and, further, '[t]alk is not an end in itself, and there should be no hesitation to seek authorization for more robust measures if quiet diplomacy is being used as a delaying tactic when an earlier and more direct response could save lives and restore order. Paragraph 139 of the Summit Outcome reflects the hard truth that no strategy for fulfilling the responsibility to protect would be complete without the possibility of collective enforcement measures, including through sanctions or coercive military action in extreme cases'. UNSG 2009 Report, Implementing RtoP (n 1342), 22-23 and 24-25.

<sup>1662</sup> See e.g. UNSG's Special Adviser's Statement on the Situation in Libya 2011 (n 1382).

<sup>1663</sup> UNSC Res 1970 (n 1490), paras 4-8 [ICC referral] and 9-21 [sanctions].

<sup>1664</sup> UNSC Res 1973 (n 1484), paras 4-5.

considered, if at all. However, an incremental approach contradicts that Chapter VII empowers the UNSC to adopt a *non-incremental* approach to its enforcement. Article 42 provides that the UNSC can authorise armed force if they consider that the situation represents a breach or threat to the peace and that less coercive means would be, or have proved to be, inadequate.<sup>1665</sup> Thus, once Article 39 has been activated the UNSC have the power to apply armed force as a measure of *first*, not *last*, resort. Accordingly, Libya raises the possibility that the approaches adopted to use of armed force in practice may be more rigid than they would be under both the criteria and Chapter VII. Furthermore, an incremental approach ultimately relies upon the ‘slippery-slope’<sup>1666</sup> nature of secondary RtoP encouraging relevant actors to protect a population from RtoP crimes. For example, collective sanctions are considered to have a deterrent effect because they can demonstrate:

‘[T]he international community’s commitment to meeting its collective responsibilities under paragraph 139 of the Summit Outcome and serve as a warning of possibly tougher measures if the violence against a population persists’.<sup>1667</sup>

However, Libya suggests that this may overestimate the deterrent effect of adopting an incremental approach because, despite the application of stringent targeted sanctions, the situation in Libya escalated to such a level that the UNSC considered it necessary to authorise the use of armed force.<sup>1668</sup> This drawback of an incremental approach is also apparent in other case studies, not least Darfur and the Côte d’Ivoire. Six years after the UNSC applied comprehensive sanctions in response to Darfur,<sup>1669</sup> extensive violations of arms sanctions and a failure to attach financial and travel sanctions continue to be reported. Despite being under a robust sanctions regime since 2006, RtoP crimes were committed in the Côte d’Ivoire, thereby raising questions over the capacity for sanctions to deter the commission of RtoP crimes in the longer term.<sup>1670</sup> This practice suggests that adopting the traditionally non-incremental approach to the discharge of Chapter VII in RtoP cases may enable the international community to protect populations’ in the requisite ‘timely and decisive’<sup>1671</sup> manner.

### *(i) Present Literature*

The literature in this area tends to focus on the merits and demerits of adopting Just War-

<sup>1665</sup> UN Charter (n 1643), art 42.

<sup>1666</sup> Alvarez, ‘The Schizophrenias of RtoP’ (n 1360).

<sup>1667</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 25.

<sup>1668</sup> See UNSC Res 1970 (n 1490) regarding the escalation of the situation in Libya and UNSC Res 1973 (n 1484) on the authorisation of the use of armed force.

<sup>1669</sup> UNSC Res 1591 (2005) UN Doc S/RES/1591.

<sup>1670</sup> UNSC Res 1975 (n 1573).

<sup>1671</sup> Outcome Document (n 1336), para 139.

type criteria.<sup>1672</sup> One group of commentators support the adoption of the criteria, arguing that the criteria could facilitate agreement on the authorisation of armed force and, furthermore, make it more difficult for States or coalitions of the willing to use armed force on the pretext of human protection when, in actual fact, it is motivated by broader political goals like regime change.<sup>1673</sup> However, this argument tends to undermine the fact that, irrespective of the potential merits of the criteria, States did not fulfil the former UNSG's recommendation to explicitly refer to all of the criteria in the Outcome Document.<sup>1674</sup> Perhaps most significantly, the view that the criteria could prevent armed force being used for broader political goals tends to disregard the fact that the ICISS provided that it was sufficient that armed force be largely, not entirely, motivated by human protection.<sup>1675</sup>

Bellamy<sup>1676</sup> is more critical of the criteria, arguing that formulating a checklist would essentially provide new technical standards for the UNSC to debate.<sup>1677</sup> The present author finds this view compelling, not least because it reflects the standpoint on the criteria which States like Australia have adopted. Australia raised concern over the potential for the criteria to stall UNSC decision making on the authorisation of armed force, arguing that the criteria 'must remain flexible so as to not tie the hands of the Council in cases where action is needed'.<sup>1678</sup> Bellamy's view is further supported by the competing views adopted by States regarding the use of armed force in Libya. Examination of State views on the UNSC's authorisation of armed force in Libya illustrates that clear divides already exist regarding

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<sup>1672</sup> See e.g. A Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (2006) 20 (2) *Ethics and International Affairs Journal* 143, 166; C Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 (1) *AJIL* 99, 109; J Bruneau, 'The Responsibility to Protect and the Use of Force: Building Legality?' (2010) 2 *Global Responsibility to Protect* 191, 199; R Thakur, 'Behind the Headlines: Iraq and the Responsibility to Protect' (2004) 62 (1) *Canadian Institute of International Affairs* 1, 13; S Breau, 'The Impact of the Responsibility to Protect on Peacekeeping' (2007) 11 (3) *Journal of Conflict and Security Law* 429, 434; W Pace and N Deller, 'Preventing Future Genocides: An International Responsibility to Protect' (2005) 36 (4) *World Order* 15, 29; M Kalkman, 'Responsibility to Protect: A Bow Without an Arrow?' (2009) 5 *Cambridge Student Law Review* 75, 85; H Nasu, 'Operationalising the Responsibility to Protect and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict' (2009) 14 (2) *Journal of Conflict and Security Law* 209, 223; MacFarlane, Thielking and Weiss (n 1360), 988; R Thakur, 'In Defence of the Responsibility to Protect' (2003) 7 (3) *Int. J. Hum. Rts.* 160, 163 and Alvarez, 'The Schizophrenias of RtoP' (n 1360).

<sup>1673</sup> Some RtoP commentators would point to the Russia-Georgia conflict as one such illustration. See e.g. G Evans, 'Russia, Georgia and the Responsibility to Protect' (2009) 1 (2) *Amsterdam Law Forum* <<http://ojs.uvu.nl/alf/article/view/58/115>> accessed 17 March 2011.

<sup>1674</sup> Report of the UNSG, 'In Larger Freedom' (n 1650), 33.

<sup>1675</sup> This was discussed in detail in chapter one.

<sup>1676</sup> Bellamy, 'Problem of Military Intervention' (n 1441).

<sup>1677</sup> *ibid.*, 627. ['It is important to recognise, however, that agreement on thresholds does not guarantee agreement on whether the thresholds have been breached or on what is the most appropriate response in actual cases']. See further at 628 and 629.

<sup>1678</sup> Statement of the Representative of Australia to the UNGA, 'Informal Discussion on Responsibility While Protecting' (21 February 2012) <<http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/4002-informal-discussion-on-brazils-concept-of-responsibility-while-protecting>> accessed 30 May 2012 ('Informal Discussion on Responsibility While Protecting'). Furthermore, Australia noted the way in which the criteria of "last resort" could implicate the effective protection of populations, arguing that '[t]he criteria of force as a last resort should not be a requirement to rigidly and physically test and exhaust all lesser options before resorting to military force, but rather a matter of making a reasonable, objective judgment based on all the available evidence that no lesser measures could succeed in halting or averting the harm in question'.

issues to which the criteria relate.<sup>1679</sup> For example, whether the use of armed force has a reasonable prospect of success. Whilst Russia<sup>1680</sup> and Brazil<sup>1681</sup> suggested that the use of armed force could cause further harm to Libyan civilians (e.g. by damaging infrastructure), the UK,<sup>1682</sup> France,<sup>1683</sup> Colombia<sup>1684</sup> and the US<sup>1685</sup> all considered that the use of armed force was permissible and necessary to protect civilians. The case study of Libya therefore suggests that it could be difficult to gain consensus among States on whether the use of armed force in a particular situation can satisfy the criteria or elements thereof.

Other commentators suggest that the focus should instead be placed on ensuring that the armed force is carried out legitimately.<sup>1686</sup> For example, Pattison argues that the focus on adopting the criteria suggests that issues of *jus ad bellum* have been prioritised over issues of *jus in bello*:

‘The recent shift in the debate away from the notion of ‘humanitarian intervention’ towards a ‘responsibility to protect’ (RtoP) has, if anything exacerbated the focus on *ad bellum* issues. Contemporary legal and political discussions have concentrated on legitimate authority (e.g., whether Security Council authorisation is necessary for intervention) and just cause (e.g., how serious the humanitarian crisis has to be in order for military intervention to be appropriate)’.<sup>1687</sup>

The present author considers that Libya tends to add weight to the view that the criteria’s legitimisation of the resort to armed force does not necessarily legitimise the actual use of armed force. For example, in the immediate aftermath of the use of armed force in Libya, some States criticised ‘the excessive use of force’<sup>1688</sup> by the coalition. These criticisms underscored Brazil’s conceptualisation of the so-called ‘responsibility whilst protecting’.<sup>1689</sup> This concept essentially recommends that decision making on the use of armed force *and* the actual use of armed force fulfil certain requirements.<sup>1690</sup> In terms of the former, Brazil’s

<sup>1679</sup> The competing interpretations of UNSC Res 1973 are also outlined by Bellamy and Williams in Bellamy and Williams, ‘Côte d’Ivoire, Libya and the Responsibility to Protect’ (n 1468), 847-848.

<sup>1680</sup> A de Carbonnel, ‘Medvedev Says Russia Worried over Use of Force in Libya’ (*Reuters*, Moscow, 22 March 2011) <<http://uk.reuters.com/article/2011/03/22/uk-libya-russia-medvedev-gates-idUKTRE72L5GI20110322>> accessed 29 March 2011.

<sup>1681</sup> Statement of the Representative of *Brazil* to the UNSC, UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498.

<sup>1682</sup> Statement of the Representative of the *United Kingdom* to the UNSC, *ibid*.

<sup>1683</sup> Statement of the Representative of France to the UNSC, *ibid*.

<sup>1684</sup> Statement of the Representative of *Colombia* to the UNSC, *ibid*.

<sup>1685</sup> Statement of the Representative of the *United States* to the UNSC, *ibid*.

<sup>1686</sup> J Pattison, ‘Humanitarian Intervention, the Responsibility to Protect and Jus in Bello’ (2009) 1 *Global Responsibility to Protect* 364 and Bellamy, *The Global Effort to End Mass Atrocities* (n 1446), 166.

<sup>1687</sup> Pattison, *ibid*, 365.

<sup>1688</sup> For e.g. the Russian Federation. See Carbonnel, ‘Medvedev Says Russia Worried over Use of Force in Libya’ (n 1680).

<sup>1689</sup> UNGA/UNSC, ‘Annex to the Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General: Responsibility while Protecting: Elements for the Development and Promotion of a Concept’ (11 November 2011) UN Doc A/66/551-S/2011/701. (UNGA/UNSC, ‘Responsibility while Protecting: Elements for the Development and Promotion of a Concept’).

<sup>1690</sup> Pattison also makes this point. See J Pattison, ‘The RtoP and Responsibility while Protecting: The Secretary-General’s Timely and Decisive Report on Timely and Decisive Responses’ (University of Denver Human Rights

proposals substantially overlap with the ICISS's Just War-type criteria. For example, Brazil urges secondary RtoP's discharge through non-peaceful measures to be 'a *truly exceptional* course of action, or a measure of *last resort*'<sup>1691</sup> (e.g. last resort criterion) and for detailed consideration to be given to whether the use of armed force could be more hindrance than help to the population at issue (e.g. reasonable prospects criterion). With respect to the latter, Brazil's recommendations tend to overlap with some of the ICISS's operational guidelines on the use of armed force, not least the requirement for the use of armed force to comply with all relevant international humanitarian law obligations.<sup>1692</sup> Brazil's 'responsibility whilst protecting'<sup>1693</sup> concept has been applauded by States like Guatemala<sup>1694</sup> and South Africa.<sup>1695</sup> The UNSG's 2012 Report on RtoP's timely and decisive response component also dedicates an entire section to explaining the concept.<sup>1696</sup> However, the concept has also raised concerns. States, such as Australia<sup>1697</sup> and the US,<sup>1698</sup> have expressed reservations over codifying an incremental approach to the discharge of secondary RtoP's non-peaceful component, suggesting that '[t]he criteria of force as a last resort should not be a requirement to rigidly and physically test and exhaust all lesser options before resorting to military force'.<sup>1699</sup> Similarly, the Netherlands<sup>1700</sup> cautioned that requiring decision makers to consider the potential negative consequences of using armed force in a particular case could mean that armed force is not used to protect populations because of "worst case scenario" considerations. To the Netherlands, assessing the consequences of armed force in advance of its usage needs to be approached carefully in order to ensure that this 'does not lead to the institutionalisation of inaction'.<sup>1701</sup> Thus, at the time of writing it remains unclear whether or not the discharge of secondary RtoP through the use of armed force in future practice will be subject to, or influenced by, the 'responsibility whilst protecting'<sup>1702</sup> concept.

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and Human Welfare Online Journal, 31 October 2012) < <http://www.du.edu/korbel/hrhw/roundtable/2012/panel-b/10-2012/pattison-2012a.html> > accessed 4 November 2012.

<sup>1691</sup> Emphasis added, Statement of the Representative of *Brazil* to the UNGA, 'Informal Discussion on Responsibility while Protecting' (n 1678).

<sup>1692</sup> On these guidelines, see ICISS Report (n 1359), 57-67.

<sup>1693</sup> UNGA/UNSC, 'Responsibility while Protecting: Elements for the Development and Promotion of a Concept' (n 1689).

<sup>1694</sup> Statement of the Representative of *Guatemala* to the UNGA, 'Informal Discussion on Responsibility While Protecting' (n 1678).

<sup>1695</sup> Statement of the Representative of *South Africa* to the UNGA, *ibid*.

<sup>1696</sup> UNSG Report 2012, Timely and Decisive Response (n 1350), 13-15.

<sup>1697</sup> Statement of the Representative of *Australia* to the UNGA, 'Informal Discussion on Responsibility While Protecting' (n 1678).

<sup>1698</sup> Statement of the Representative of the *United States* to the UNGA, *ibid*.

<sup>1699</sup> Statement of the Representative of *Australia* to the UNGA, *ibid*.

<sup>1700</sup> Statement of the Representative of the *Netherlands* to the UNGA, *ibid*.

<sup>1701</sup> *ibid*.

<sup>1702</sup> UNGA/UNSC, 'Responsibility while Protecting: Elements for the Development and Promotion of a Concept' (n 1689).

### 3.2.2 Filling the Gap: Coercing, Inducing or Bypassing UNSC Authorisation

Requiring UNSC authorisation for non-peaceful responsive measures means that their discharge is ultimately dependent upon the P5 refraining from using the veto. Practice to date suggests that the prospect of the veto preventing the discharge of secondary RtoP remains a real problem. Admittedly, neither Russia nor China wielded their veto power to prevent the use of armed force in Libya despite the relatively short time given for the UNSC to consider its authorisation.<sup>1703</sup> Nevertheless, Syria tends to negate the possibility that Libya may have shown positive developments regarding the use of the veto in RtoP cases. After all, Russia and China have, at the time of writing, wielded their veto no less than three times in order to prevent the UNSC from putting conditions upon the Syrian national authorities, including a mere threat of redress to Chapter VII measures in the event of the authorities' non-compliance.<sup>1704</sup> In such cases, what can the international community do to give effect to their commitment to undertake a 'timely and decisive'<sup>1705</sup> response through non-peaceful measures? Practice to date suggests that three approaches could possibly be adopted. The nature of these approaches broadly overlaps with those adopted when a State's refusal to provide consent to the provision of international assistance similarly threatens the capacity for secondary RtoP to be discharged effectively.

First, the broader international community may try to *induce* UNSC authorisation through diplomatic action. In the lead up to UNSC meetings regarding further draft Resolutions on Syria, a number of State representatives, the Joint Arab League and UN Special Envoy on Syria and the UNSG, called upon and/or met with Russian diplomats to try to encourage their cooperation at the UNSC.<sup>1706</sup> The UNGA was also utilised to circumvent the UNSC's failure to unequivocally condemn the violence in Syria and to put diplomatic pressure on Russia and China to be more cooperative in the UNSC. In this line, the UNGA adopted two Resolutions on the situation in Syria in the immediate aftermath of vetoed UNSC action,

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<sup>1703</sup> See the Statement of the Representatives of the *Russian Federation* and *China* to the UNSC, UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498.

<sup>1704</sup> See draft UNSC Resolutions and the Statements of the Representatives of *China* and the *Russian Federation* with regard to their decision to veto: (i) Draft UNSC Res S/2011/612 (4 October 2011) UN Doc S/2011/612 and UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627; (ii) Draft UNSC Res S/2012/77 (4 February 2012) UN Doc S/2012/77 and UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711; and (iii) Draft UNSC Res S/2012/538 (19 July 2012) UN Doc S/2012/538 and UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810.

<sup>1705</sup> Outcome Document (n 1336), para 139.

<sup>1706</sup> See e.g. UN News, 'Syria: After Moscow Meeting, Joint Special Envoy Voices Hope for Council Agreement' (New York, 17 July 2012) <<http://www.un.org/apps/news/story.asp?NewsID=42491&Cr=Syria&Cr1=>> accessed 20 July 2012; 'U.S. President Barack Obama Meets with Russian President Putin in Los Angeles' *Chicago Tribune* (Chicago, 19 June 2012) <<http://www.chicagotribune.com/news/columnists/ct-met-aj-kass-obama-putin.jpg-20120623,0,1874175.photo>> accessed 20 July 2012; UNSG, 'Readout of the Secretary-General's Meeting with H.E. Mr. Sergey Lavrov, Minister of Foreign Affairs of the Russian Federation' (16 February 2012) <<http://www.un.org/sg/offthecuff/index.asp?nid=2229>> accessed 20 July 2012.

thereby demonstrating the existence of broad political will for collective action in Syria.<sup>1707</sup> A State may also try to induce authorisation by curtailing its existing economic ties with a UNSC member who is failing to cooperate with the broader will of the international community. To this effect, it is notable that, following the third double Russian-Chinese veto, the US almost immediately suspended its arms trade agreements with Russia.<sup>1708</sup>

Second, members of the international community may try to *coerce* UNSC authority. Notably, States, such as France<sup>1709</sup> and the US,<sup>1710</sup> used language suggestive of a possible willingness to act collectively outside the UNSC should Russia and China continue to hinder international efforts to respond to the situation in Syria effectively. To date, this has transformed into some forms of concrete action, including the application of unilateral sanctions.<sup>1711</sup> However, as no State explicitly justified these measures on the basis of secondary RtoP, it is possible that unilateral measures are still considered to fall outside the RtoP framework and instead represent, at the very most, a parallel regime.

This is not to say that unilateral non-peaceful measures have no place in RtoP cases, however. All States are free to determine the nature and extent of their relations with other States, pursuant to existing obligations such as trade agreements. Indeed, a primary example of this is Italy gaining a concession to participation in the European Union's sanctions against the Syrian regime so that it could fulfil its existing trade agreements with Syria.<sup>1712</sup> Furthermore, unilateral sanctions can be effective when they are used to prop up existing collective sanctions. This is because the effectiveness of collective sanctions is ultimately dependent upon being 'fully and consistently implemented by Member States'.<sup>1713</sup> Practice suggests that it is generally difficult to ensure that *all* UN Member States comply with sanctions applied by the UNSC.<sup>1714</sup> Furthermore, compliance with UNSC authorised

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<sup>1707</sup> UN Press Release, 'Third Committee Approves Resolution Condemning Human Rights Violations in Syria' (n 1624) and UN Press Release, 'General Assembly Adopts more than Sixty Resolutions Recommended by Third Committee Including Text Condemning Grave, Systematic Human Rights Violations in Syria' (n 1624).

<sup>1708</sup> 'Syrian Protest Derails US Mi-17 Deal with Russia' (*Flight Global*, 20 July 2012) <<http://www.flightglobal.com/news/articles/syrian-protest-derails-us-mi-17-deal-with-russia-374580/>> accessed 22 July 2012.

<sup>1709</sup> For instance, after the third double veto France cautioned: 'This double veto leaves the Security Council disarmed amid the violence of the Assad regime, but France will not leave the Syrian people alone in the face of the crimes being committed against them'. Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810.

<sup>1710</sup> For example, after the third double veto the United States argued: 'The United States has not and will not pin its policy on an unarmed observer mission that is deployed in the midst of such widespread violence and that cannot even count on the most minimal support of this Security Council. Instead, we will intensify our work with a diverse range of partners outside the Security Council to bring pressure to bear on the Assad regime and to deliver assistance to those in need. The Security Council has failed utterly in its most important task on its agenda this year. This is another dark day in Turtle Bay'. Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810.

<sup>1711</sup> For example the United States, see White House Executive Order April 2011 (n 1495).

<sup>1712</sup> On Italy's concession, see 'EU Steps up Syria Sanctions with Ban on Oil Imports' (*BBC News*, London, 2 September 2011) <<http://www.bbc.co.uk/news/world-middle-east-14759416>> accessed 5 January 2012.

<sup>1713</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 25.

<sup>1714</sup> See e.g. the sanctions committee on Libya, reporting that several months after the sanctions were applied, the committee had only received thirty implementation reports from member States. The number was not increased

sanctions by States proximate to the State subject to the sanctions could be interpreted as simply an act of compliance with UN Charter obligations, not as a signal of potentially more coercive unilateral measures if the situation is not resolved. Accordingly, States' application of unilateral sanctions in conjunction with the collective sanctions can, when applied by the immediate neighbours or allies of the State concerned, help to send a clearer message of condemnation of the situation inside the State. This can reinforce to the State at issue that their neighbouring State/ally is not merely complying with UNSC authorised sanctions because of its UN Charter obligations but, rather, as a signal of their preparedness to potentially support or undertake more coercive unilateral/collective responses if the situation is not resolved.

Third, members of the international community may *bypass* the requirement for UNSC authorisation. Some States have taken unilateral actions in order to strengthen the collective measures applied to protect the population (e.g. arms drop to Libyan rebels<sup>1715</sup>) or, alternatively, to address the vacuum in protection created when the UNSC fails to authorise non-peaceful responsive measures (e.g. application of regional/unilateral sanctions in Syria<sup>1716</sup>). To date, these measures have not extended to the use of unauthorised and/or unilateral armed force. Whilst Russia used unilateral and unauthorised armed force against Georgia under the pretext of discharging its RtoP Russian citizens residing in South Ossetia,<sup>1717</sup> the legality and legitimacy of this claim was readily denounced by the broader international community.<sup>1718</sup> No other State has argued that the unilateral or unauthorised use of armed force is an appropriate secondary RtoP response. However, it remains to be seen

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by the committee issuing two notes verbale reminding member States of their reporting responsibility. UNSC Committee, 'Chairman's Second Report Pursuant to Paragraph 24 (e) of Security Council Resolution 1970 (2011)' (24 June 2011).

<sup>1715</sup> 'Libya: Russia Decries French Arms Drop to Libyan Rebels' (n 1472).

<sup>1716</sup> For details on Turkey's sanctions and those of the Arab League (including diplomatic sanction of suspending Syria from the regional organisation) see 'Turkey Imposes Economic Sanctions on Syria' (n 1495). On Arab Leagues' suspension of Syria, see e.g. Y Saleh and A Samir, 'Arab League Suspends Syria as Global Pressure Rises' (*Reuters*, Cairo, 12 November 2011) <<http://www.reuters.com/article/2011/11/12/us-arabs-syria-idUSTRE7AB0CP20111112>> accessed 5 January 2012. On United States economic sanctions see, White House Executive Order April 2011 (n 1495); White House Executive Order May 2011 (n 1495); White House Executive Order August 2011 (n 1495). With regard to sanctions imposed by the European Union see 'Statement of the High Representative on the Extension of Restrictive Measures Against Syrian Individuals Responsible for and associated with Repression' (1 August 2011) <[http://www.eu-un.europa.eu/articles/fr/article\\_11265\\_fr.htm](http://www.eu-un.europa.eu/articles/fr/article_11265_fr.htm)> accessed 5 January 2012; International Coalition for the Responsibility to Protect, 'Crisis in Syria' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria>> accessed 5 January 2012 and 'EU Tightens Sanctions on Syria' (*Aljazeera*, 1 December 2011) <<http://www.aljazeera.com/news/middleeast/2011/12/2011121125337233662.html>> accessed 5 January 2012.

<sup>1717</sup> See respectively, Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5952 and "Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC" (*Ministry of Foreign Affairs of the Russian Federation*, Moscow, 9 August 2008) <[www.ln.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcb3/f87a3fb7a7f669ebc32574a100262597?OpenDocument](http://www.ln.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcb3/f87a3fb7a7f669ebc32574a100262597?OpenDocument)> accessed 11 May 2012.

<sup>1718</sup> See generally State responses in the UNSC: UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5952; UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5951; UNSC Verbatim Record (10 August 2008) UN Doc S/PV.5953; UNSC Verbatim Record (19 August 2008) UN Doc S/PV.5961 and UNSC Verbatim Record (28 August 2008) UN Doc S/PV.5969. State denouncement of the use of armed force is discussed at length in chapter six.



whether the continued inability to act through the UNSC in response to Syria may cause this position to change. Similarly, no regional organisation or coalition of the willing has yet claimed to be able to act without the prior authorisation of the UNSC. Admittedly, ECOWAS did threaten the use of armed force with respect to the situation in the Côte d'Ivoire.<sup>1719</sup> However, this was a *threat* and the fact that ECOWAS approached the UNSC to request authorisation for the use of armed force in Mali tends to undermine the possibility that its response to the Côte d'Ivoire was indicative of its preparedness to use unauthorised collective armed force under secondary RtoP.<sup>1720</sup>

Present literature discusses additional routes through which to bypass the requirement for UNSC authority. A frequent recommendation is for the UNGA to invoke its residual responsibility to maintain international peace and security and, acting under the Uniting for Peace Resolution, recommend the application of collective sanctions or armed force.<sup>1721</sup> Admittedly, the Outcome Document provides that non-peaceful responsive measures are to be discharged 'through the Security Council, in accordance with the Charter, *including* Chapter VII'.<sup>1722</sup> On the one hand, the italicised term could open the way for non-peaceful responsive measures to be based upon Chapter IV of the Charter and its explicit conferral of a residual responsibility to maintain international peace and security upon the UNGA.<sup>1723</sup> Conversely, the present author would suggest that the Outcome Document tends to qualify this because it clearly provides for non-peaceful measures to be discharged 'through the Security Council'.<sup>1724</sup>

<sup>1719</sup> ECOWAS applied sanctions against Côte d'Ivoire and threatened to use force if the situation in the Côte d'Ivoire did not improve. See respectively, ECOWAS, 'Final Communiqué of the Extraordinary Session of the Authority of Heads of State and Government on the Côte d'Ivoire' (24 December 2010) No 192/2010 and ECOWAS, 'Resolution A/RES.1/03/11 of the Authority of the Heads of State and Government of ECOWAS on the Situation in the Côte d'Ivoire' (1 March 2011) No 043/2011. See further Bellamy, *The Global Effort to End Mass Atrocities* (n 1446), 146.

<sup>1720</sup> See UN Press Release, 'Security Council Examining Request for UN Mandate for African Troops in Mali' (18 June 2012) <<http://www.un.org/apps/news/story.asp?NewsID=42266&Cr=mali+&Cr1=>> accessed 6 July 2012.

<sup>1721</sup> See e.g. Thakur, 'Behind the Headlines' (n 1672), 13; Breau (n 1672), 434; Pace and Deller (n 1672), 29; Kalkman (n 1672), 85; Bruneau (n 1672), 199; N Wheeler, 'Legitimizing Humanitarian Intervention: Principles and Procedures' (2001) 2 Melbourne Journal of International Law 1, 12, 16 and 17 (notes the difficulty of attaining consensus and associated difficulties such as that a case satisfy the specific requirements of the Resolution). The use of this Resolution to circumvent a failure to act on the part of the Security Council has also been proposed by: ICISS Report (n 1359), 53; UNSG 2009 Report, Implementing RtoP (n 1342), 25; Statement of the Representative of *Cameroon* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statement of the Representative of *Benin* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statement of the Representative of *Lesotho* to the UNGA in UN Press Release, 'More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on the Responsibility to Protect' (24 July 2009) UN Doc GA/10849; Statement of Egypt (on behalf of the Non-Aligned Movement) to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97; Statement of the Representative of *Azerbaijan* to the UNGA in UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (28 July 2009) UN Doc GA/10850 and Statement of the Representative of *Chile* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

<sup>1722</sup> Outcome Document (n 1336), para 139, emphasis added.

<sup>1723</sup> UN Charter (n 1643), art 11 (2). For a discussion of the substance and basis of the Uniting for Peace Resolution see for example C Tomuschat, 'Uniting for Peace' (*UN Audiovisual Library of International Law*, 2008) <<http://untreaty.un.org/cod/avl/ha/ufp/ufp.html>> accessed 17 May 2011. See also Gray (n 1648), 259-61.

<sup>1724</sup> Outcome Document (n 1336), para 139.

Some commentators<sup>1725</sup> seem to overlook the fact that the scope of the Uniting for Peace Resolution is narrow. As O’Connell<sup>1726</sup> explains, the Resolution permits the UNGA to *recommend* the use of armed force which conforms to the prohibition on armed force.<sup>1727</sup> This means that the UNGA can only use the Uniting for Peace Resolution to recommend the use of armed force which is being undertaken (i) with the consent of the State concerned; (ii) as part of a States right to self-defence;<sup>1728</sup> or (ii) with UNSC authorisation.<sup>1729</sup> This undermines the capacity of the Resolution to legitimate the use of armed force which is illegal and, particularly, the use of armed force to protect populations which is not authorised by the UNSC. Of course, if secondary RtoP were to develop in State practice as a new legal basis for the use of armed force, the Resolution could assume a legalising function. In the interim, any discharge of secondary RtoP through armed force which has been recommended by the UNGA would lack a legal mandate.<sup>1730</sup> In light of this, the present author finds the opposing view in present literature to be more persuasive and politically realistic. In this section of the literature, the Uniting for Peace Resolution is limited to a route through which to bypass the UNSC’s failure to authorise *collective sanctions short of the use of armed force*.<sup>1731</sup> This seems consistent with practice to date which has limited discussion of the Uniting for Peace Resolution to the role that it could have in securing the application of enforcement measures below armed force, such as collective diplomatic sanctions.<sup>1732</sup>

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<sup>1725</sup> This tendency in the literature usually arises from outlining, rather than assessing, the proposals in the ICISS Report with regard to circumventing a failure of the Security Council to act. Notably, ICISS did emphasise that the Uniting for Peace Resolution would lack binding force and, therefore, would be more an instrument through which to legitimise unauthorised armed force than legalise it. See e.g. Pace and Deller (n 1672), 29 and L Tiewa, ‘China and the Responsibility to Protect: Maintenance and Change for its Policy of Intervention’ (2012) 25 (1) *The Pacific Review* 153, 156-157. See also, ICISS Report (n 1359), 53.

<sup>1726</sup> M O’Connell, ‘Responsibility to Peace: A Critique of RtoP’ in Cunliffe, *Critical Perspectives on the Responsibility to Protect* (n 1412). This distinction is also recognised by Levine and Egerton and Knight. See respectively Levine, ‘Some Concerns about the Responsibility Not to Veto’ (n 1492), 325 and Wheeler and Dunne, ‘Operationalising Protective Intervention: Alternative Models of Authorisation’ (n 1549) 95-96.

<sup>1727</sup> O’Connell, *ibid*, 75-77.

<sup>1728</sup> As per UN Charter (n 1643), art 51.

<sup>1729</sup> As per UN Charter, *ibid*, art 42.

<sup>1730</sup> On the difference between a recommendation and a binding provision see particularly O’Connell (n 1726), 75-77. On the difficulty in attaining the consensus of the UNGA and the way in which this could undermine its effectiveness as an outlet through which to bypass the failure of the Security Council to act, see especially Wheeler, ‘Legitimizing Humanitarian Intervention: Principles and Procedures’ (n 1721), 12, 16 and 17 and A. Orford, ‘From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept’ (2011) 3 *Global Responsibility to Protect* 400, 407-409.

<sup>1731</sup> M Payandeh, ‘With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking’ (2010) 35 *Yale Journal of Int’l L.* 469, 504-505.

<sup>1732</sup> See especially, UNSG 2009 Report, Implementing RtoP (n 1342), 25; Statement of the Representative of *Cameroon* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statement of the Representative of *Benin* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statement of the Representative of *Lesotho* to the UNGA in UN Press Release, ‘More than Forty Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on the Responsibility to Protect’ (n 1722); Statement of Egypt (on behalf of the Non-Aligned Movement) to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97; Statement of the Representative of *Azerbaijan* to the UNGA in UN Press Release, ‘Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate’ (n 1722) and Statement of the Representative of *Chile* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

Some commentators<sup>1733</sup> have reviewed at length whether unilateral sanctions can be used in order to discharge secondary RtoP when the UNSC refuses to authorise collective sanctions. However, such measures have not been used under this pretext in practice and, therefore, appear to exist presently as measures which can be discharged concurrently with collective secondary RtoP measures. Similarly, consideration has been given to whether the Outcome Document leaves open the possibility of using unauthorised armed force.<sup>1734</sup> However, as noted above, the interpretation given to the Outcome Document in practice to date is that UNSC authority is required.<sup>1735</sup> Notwithstanding this, there remains a risk that the international community may need to resort to illegal armed force in order to protect populations when the UNSC fails to act, a risk heightened each time Russia and China refuse to authorise a collective response to Syria. Accordingly, secondary RtoP has not entirely reconciled the policy dilemma of humanitarian intervention, specifically the argument that armed force can be “illegal but legitimate” in certain cases.<sup>1736</sup>

Indeed, the fact that Russia and China have used the veto in a case involving clear RtoP-type harm to a population tends to also undermine the other proposal made in the literature

<sup>1733</sup> See especially, Payandeh (n 1731), 508-513 and V Bilkova, “The Responsibility to Protect: Unilateral Non-Forcible Measures and International Law” in A Nollkaemper and J Hoffmann (eds), *The Responsibility to Protect: From Principle to Practice* (Amsterdam University Press, Amsterdam 2012) 291-305.

<sup>1734</sup> Bellamy has observed that the Outcome Document’s failure to prohibit unauthorised action may provide ‘a window for lawyers to defend unauthorised intervention by reference to the outcome document’. Bellamy, ‘Whither the Responsibility to Protect’ (n 1672), 166. See further, Stahn (n 1672), 109 and Payandeh, *ibid*, 507-508. On the range of considerations which could undermine the prospect of States resorting to the use of unilateral and/or unauthorised armed force for human protection purposes, see especially C Badescu, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (Routledge, Abingdon 2011) 158-159; A Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (Routledge, Abingdon 2011) 155; C Lu, ‘Humanitarian Intervention: Moral Ambition and Political Constraints’ (2007) 62 *Int’l J.* 942, 947-949 and J Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (OUP, Oxford 2010) 8-9.

<sup>1735</sup> This has been affirmed by the overwhelming majority of States and most commentators. See e.g. Statement of Australia to the UNGA, ‘High-Level Meeting of the Plenary’ (28 July 2005); Statement of Canada to the UNGA, ‘High-Level Meeting of the Plenary’, (21 June 2005); Statement of Chile to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005); Statement of China to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005); Statement of Colombia to the UNGA, ‘High-Level Meeting of the Plenary’ (30 June 2005); Statement of Dominica (on behalf of CARICOM) to the UNGA, ‘High-Level Meeting of the Plenary’ (30 June 2005); Statement of the European Union to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005); Statement of France to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005); Statement of Israel to the UNGA, ‘High-Level Meeting of the Plenary’ (30 June 2005); Statement of New Zealand to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005); Statement of Tanzania to the UNGA, ‘High-Level Meeting of the Plenary’ (30 June 2005) and Statement of the United States to the UNGA, ‘High-Level Meeting of the Plenary’ (22 June 2005). All statements are available at

<[http://old.reformtheun.org/index.php/government\\_statements/c427?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c427?theme=alt2)> accessed 7 August 2012 and The majority of commentators consider that the Outcome Document does predicate the use of armed force upon Security Council authority, see for instance G Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings, Washington D.C. 2008) 223-41; Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’ (n 1626), 456; J Welsh and M Banda, “International Law and the Responsibility to Protect: Clarifying or Expanding States’ Responsibilities” in A Bellamy, S E Davies and L Glanville (eds), *The Responsibility to Protect and International Law* (Martinus Nijhoff, Leiden 2011) 225; Breau (n 1672), 440 and 464; Nasu (n 1672), 219; E McClean, ‘The Responsibility to Protect: The Role of International Human Rights Law’ (2008) 13 (1) *Journal of Conflict and Security Law* 123, 129; J McCarthur, ‘A Responsibility to Rethink? Challenging Paradigms in Human Security’ (2008) 63 *Int’l J.* 422, 431-33 and N Wheeler and F Egerton, ‘The Responsibility to Protect: ‘Precious Commitment’ or a Promise Unfulfilled?’ (2009) 1 *Global Responsibility to Protect* 114, 128-29.

<sup>1736</sup> This dilemma is reviewed in further depth in the next chapter.

with regard to overcoming UNSC inaction, namely for the P5 to agree to not wield the veto in RtoP cases.<sup>1737</sup> Similarly, the use of the veto in Syria illustrates that Blätter and William's assertion that the 'responsibility not to veto'<sup>1738</sup> is making 'headway within P5 States'<sup>1739</sup> does not extend presently to Russia and China. The proposal was rejected at the World Summit,<sup>1740</sup> with members of the P5 (e.g. China,<sup>1741</sup> Russia<sup>1742</sup> and the US<sup>1743</sup>) suggesting that urging them to refrain from using the veto in RtoP cases corresponded to an expectation that the UNSC *should* authorise the use of armed force to protect populations and, therefore, that it was necessary to reinforce the UNSC's Chapter VII discretion over whether or not to authorise the application of enforcement measures.<sup>1744</sup> As a result of this viewpoint, the final text qualified the use of non-peaceful responsive measures to a 'case-by-case basis'.<sup>1745</sup> The present author would argue that the inclusion of this phrase in the Outcome Document indirectly provides for the use of this discretion, including via the use of the veto, to be entirely consistent with the international community's responsibility to protect. Accordingly, the recommendation to abolish the veto seems to the present author to, as yet, be merely another recommendation 'which has no teeth'.<sup>1746</sup>

### 3.2.3 Secondary RtoP's Non-Peaceful Discharge: The Question of Regime Change

Is regime change an acceptable outcome of secondary RtoP's discharge? As the ICISS directly addressed issues pertaining to what constitutes a "right intention" for the use of

<sup>1737</sup> See e.g. Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 1626), 453 and Thakur, 'Behind the Headlines' (n 1672), 12; A Peters, "The Responsibility to Protect and the Permanent Five: The Obligation to Give Reasons for a Veto" in Nollkaemper and Hoffmann (n 1733), 199-211 and A Blätter and P D Williams, 'The Responsibility Not to Veto' (2011) 3 (3) GRtoP 301. The legal merits and demerits of this proposal and the way in which it has been approached among States are considered at length in the next chapter.

<sup>1738</sup> A Blätter and P D Williams, *ibid*, 301.

<sup>1739</sup> Blätter and Williams, *ibid*, 318.

<sup>1740</sup> Earlier drafts of the OD invited the UNSC to 'refrain from using the veto' in RtoP cases but the final text omitted this provision. See e.g. UNGA, 'Revised draft outcome document of the High-level Plenary Meeting of the General Assembly of September 2005 submitted by the President of the General Assembly' (5 August 2005) UN Doc A/59/HLPM/CRP.1/Rev.2.

<sup>1741</sup> Statement of *China* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) <[http://old.reformtheun.org/index.php/government\\_statements/c427?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c427?theme=alt2)> accessed 7 August 2012.

<sup>1742</sup> Statement of the *Russian Federation* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005), *ibid*.

<sup>1743</sup> The United States stated 'that a determination as to what particular measures to adopt in specific cases cannot be predetermined in the abstract but *should remain a decision within the purview of the Security Council*'. Statement of the Acting Representative of the *United States* to the UNGA, 'US Proposals for UN Reform' (22 June 2005) <[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 14 May 2012.

<sup>1744</sup> The United States stated 'that a determination as to what particular measures to adopt in specific cases cannot be predetermined in the abstract but *should remain a decision within the purview of the Security Council*'. Statement of the Acting Representative of the *United States* to the UNGA, *ibid*.

<sup>1745</sup> Outcome Document (n 1336), para 139.

<sup>1746</sup> This phrase is borrowed from Arbour who uses it to highlight the way in which calling for a complete distinction between regime change and the discharge of secondary RtoP can, in cases like Syria, be politically unrealistic. Arbour, 'For Justice and Civilians' (n 1489).

armed force<sup>1747</sup> and the ways in which States subject to the use of armed force should be rebuilt,<sup>1748</sup> the ICISS were almost compelled to adopt a position on the acceptability of regime change as a reason for, or outcome of, secondary RtoP's non-peaceful discharge. Whilst the ICISS recognised that a government's failure to protect its population can contribute to decision making on the use armed force for human protection purposes, the ICISS cautioned that the objective of using armed force is 'not to change constitutional arrangements or undermine sovereignty, but to protect them'.<sup>1749</sup>

In contrast, the Outcome Document omits reference to issues pertaining to the rebuilding of States following the use of armed force and the criteria which a decision to use armed force should satisfy. Arguably, this enabled the Outcome Document drafters to simply leave the question of whether regime change is an acceptable outcome of secondary RtoP's discharge as an issue *to be developed in subsequent State practice*. Of course, this was a political necessity. If regime change had been impliedly excluded, those States who consider that governments which harm their own population can be overthrown would have been unlikely to accept the Outcome Document. If regime change had been expressly permitted, the Outcome Document may not have been accepted by States which were concerned that secondary RtoP and humanitarian intervention are 'the same coin with a different face'.<sup>1750</sup>

On the one hand, leaving the matter open to development in State practice could help secondary RtoP more effectively protect populations. Armed force carried out on the pretext of humanitarian intervention, such as the Kosovo intervention,<sup>1751</sup> suggests that regime change will often be an unavoidable result of the use of force for human protection purposes. Indeed, the use of armed force in Libya did lead to the overthrow of the Gaddafi regime, preventing the regime from harming the Libyan population again.

On the other hand, the Libya case study illustrates that simply leaving this matter open to subsequent development can cause States who are sensitive to external regime change (e.g. Russia<sup>1752</sup>) to question or retract their acceptance of the RtoP framework at the World

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<sup>1747</sup> ICISS Report (n 1359), 35-36.

<sup>1748</sup> *ibid*, 39-47.

<sup>1749</sup> ICISS Report, *ibid*, 25. See further at 43, explaining that 'the responsibility to protect is fundamentally a principle designed to respond to threats to human life, and not a tool for achieving political goals such as greater political autonomy, self-determination, or independence for particular groups within the country (though these underlying issues may well be related to the humanitarian concerns that prompted the military intervention). The intervention itself should not become the basis for further separatist claims'. and, further, that the objective of the use of force is 'not to change constitutional arrangements or undermine sovereignty, but to protect them'.

<sup>1750</sup> Statement of the Representative of *Sudan* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

<sup>1751</sup> On this point, see H Hannum, 'The Responsibility to Protect: Paradigm or Pastiche?' (2009) 60 (2) *NILQ* 135, 143.

<sup>1752</sup> See Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (25 June 2012) UN Doc S/PV.6790. Note also that Russia explained its first veto of proposed Security Council action in relation to the crisis in Syria in the following manner: 'Given the basis of statements by some *Western politicians on President Al-Assad's loss of legitimacy*, such an approach could trigger a full-fledged conflict in Syria and destabilization in the region as a whole', emphasis added. Statement of the *Russian Federation* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627.

Summit. Notably, States such as South Africa,<sup>1753</sup> Russia<sup>1754</sup> and China<sup>1755</sup> argued that regime change in Libya exceeded the scope of Resolution 1973. Accordingly, these States appeared to consider that discharging secondary RtoP through the use of armed force should not facilitate regime change, even when it is the existing regimes' perpetration of RtoP crimes against its population that triggers the UNSC's authorisation of armed force. Arguably, some third States' declarations that the NTC are the 'sole governmental authority'<sup>1756</sup> of Libya underscored these States' apprehensions over secondary RtoP's capacity to legitimate regime change. These declarations raise, at least the possibility, that some States' consider regime change to be an acceptable outcome of secondary RtoP's discharge, especially when the population sustains harm from the existing government. Perhaps most significantly, the aforementioned declarations were made *before* armed force was used in Libya. This opens up the possibility that some States' consider regime change to be acceptable when a government perpetrates RtoP crimes against its population even *before* armed force has been authorised by the UNSC, thereby generating concern over whether secondary RtoP could be used as a pretext for intervention for broader political goals like the overthrow of governments.

This has a bearing on present literature regarding the scope and substance of the relationship between secondary RtoP and regime change. In terms of the former, the declarations of some third States' in Libya raises the possibility that limiting secondary RtoP's connection to regime change to cases in which it is discharged through armed force may conceptualise the relationship too narrowly.<sup>1757</sup> In terms of the substance of the relationship, commentators adopt opposing viewpoints. Some commentators<sup>1758</sup> challenge the view that Libya highlights the ever closer connection between secondary RtoP and regime change. Pattison,<sup>1759</sup> Dunne<sup>1760</sup> and Weiss<sup>1761</sup> all concur that regime change did not *motivate the use of armed force* in Libya, thereby setting aside the question of whether

<sup>1753</sup> Statement of the Representative of *South Africa* to the UNSC, UNSC Verbatim Record (28 July 2011) UN Doc S/PV.6595. See also, Statement of the Representative of *South Africa* to the UNSC in UN Press Release, 'Under-Secretary-General for Political Affairs, Briefing Security Council on Libya Situation, Says Negotiation Process must have Time to 'Grow and Bear Fruit'' (27 June 2011) UN Doc SC/10297.

<sup>1754</sup> Statement of the *Russian Federation* to the UNSC, UNSC Verbatim Record (4 May 2011) UN Doc S/PV.6528.

<sup>1755</sup> Statement of *China* to the UNSC, *ibid.*

<sup>1756</sup> 'Britain Expels Gaddafi's Embassy Staff' (n 1487).

<sup>1757</sup> For example, Hannum argues that the 2008 recognition of Kosovo's statehood: '[C]onfirms the worst fears of those who see theoretically "humanitarian intervention" as a first step to overthrowing governments and breaking up the territorial integrity and independence that many States won only a few decades ago'. Hannum (n 1751), 143. See further, J Pattison, 'The Ethics of Humanitarian Intervention in Libya' (2011) 25 (3) *Ethics & Int. Affairs* 271, 272-273.

<sup>1758</sup> See e.g. Pattison, *ibid.*; T G Weiss, 'RtoP Alive and Well After Libya' (2011) 25 (3) *Ethics & Int. Affairs* 287, 291 and T Dunne, 'RtoP, Libya and the Myth of Regime Change' (*Lowy Institute for International Policy: The Interpreter*, 5 September 2012) <<http://www.lowyinterpreter.org/post/2012/09/05/RtoP-Libya-and-the-myth-of-regime-change.aspx>> accessed 4 October 2012.

<sup>1759</sup> Pattison, 'The Ethics of Humanitarian Intervention in Libya', *ibid.*, 288-289.

<sup>1760</sup> Dunne, 'RtoP, Libya and the Myth of Regime Change' (n 1758).

<sup>1761</sup> T G Weiss, 'RtoP Alive and Well After Libya' (n 1758), 291.

regime change motivated, or was facilitated by, third States provision of *assistance* to the rebels. Bellamy and Williams represent the middle ground of present debate.<sup>1762</sup> They recognise that regime change can be a necessary outcome when the government perpetrates RtoP crimes inside the State but, nevertheless, *encourage consideration* of whether *it is possible to distinguish* secondary RtoP from regime change and still ensure populations' protection.<sup>1763</sup> A primary recommendation is for the use of armed force to always have UNSC authority.<sup>1764</sup> To Bellamy and Williams, UNSC authorisation ensures that potential interveners can convince the P5 that regime change is not the primary motivation of the use of armed force.<sup>1765</sup> The present author considers that this proposal is unlikely to regulate the issue effectively. The most convincingly argued proposal for protecting populations through the use of armed force is highly unlikely to lead Russia and China to support the UNSC in authorising the use of armed force in Syria. Indeed, Syria highlights that, even in cases where populations are clearly sustaining RtoP-type harm, the broader political interests which certain States have in ensuring that intervention does not occur in a particular State will be prioritised over the necessity of a timely and decisive response. In such cases, the present author doubts that a strong argument about using force to protect a population would succeed in convincing all members of the P5 to set aside their own political interests. In light of this, the present author considers that the most compelling view in present literature is that adopted by Luck<sup>1766</sup> and Arbour.<sup>1767</sup> They acknowledge that regime change can be absolutely necessary in cases where the government has perpetrated RtoP crimes against its population but, significantly, do not similarly encourage consideration to be given to *curtailing* the relationship to cases where armed force *is used* and *authorised* by the UNSC.<sup>1768</sup>

At present, policymakers have left to one side whether regime change can be a legitimate outcome of the use of armed force or, indeed, secondary RtoP's discharge more generally. Whilst it would be impossible for policymakers to settle a matter as politically charged as this all at once, Libya highlights that leaving the issue unsettled can reinforce reservations about the potential impact of secondary RtoP on fundamental principles like non-interference in internal affairs and neutrality in civil wars. Moreover, the ambiguity which presently

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<sup>1762</sup> See generally, Bellamy, 'The Responsibility to Protect and the Problem of Regime Change' (n 1489); Bellamy and Williams, 'Côte d'Ivoire, Libya and the Responsibility to Protect' (n 1468) and Bellamy, 'Stopping Genocide and Mass Atrocities' (n 1489).

<sup>1763</sup> Bellamy, 'Stopping Genocide and Mass Atrocities', *ibid.* Bellamy's proposals on how to regulate the relationship between secondary RtoP and regime change are examined in more detail in chapter seven.

<sup>1764</sup> *ibid.*

<sup>1765</sup> *ibid.*

<sup>1766</sup> Statement of Edward Luck in interview with Bernard Gwertzman on behalf of the Council on Foreign Relations (1 September 2011) cited in Bellamy, *ibid.*

<sup>1767</sup> Statement of Edward Luck, *ibid* and Arbour, 'For Justice and Civilians, Don't Rule Out Regime Change' (n 1489).

<sup>1768</sup> Statement of Edward Luck, *ibid* and Arbour, *ibid.*

surrounds the issue can enable States to support the overthrow of regimes failing to fulfil primary RtoP and facilitate other States to retract their acceptance of the RtoP framework. Thus, whilst policymakers may want to avoid addressing this question in order to not jeopardise secondary RtoP's maintenance in practice, they must realise that a failure to confront the matter poses just as much of a threat to secondary RtoP's future.

## Conclusion

By drawing upon approaches in practice to date, the chapter outlined the scope of secondary RtoP's early warning, assistance and responsive components. Noting the wide range of measures which may be used to discharge secondary RtoP and their competing nature, the chapter argued that secondary RtoP's scope can mean different things in different cases. Whereas in Libya its scope did involve armed force, in the Côte d'Ivoire its scope took hold as international assistance. Secondary RtoP's scope in practice is then, in many ways, best described as *context-dependent*. Perhaps most significantly, as the discharge of secondary RtoP is not simply a question of whether or not to *use force*, the scope of the responsibility is clearly not synonymous with humanitarian intervention.<sup>1769</sup>

A recurrent theme throughout the chapter was secondary RtoP's relationship with existing obligations/practice. Essentially, the chapter suggests that there are four dimensions to this relationship. First, secondary RtoP does replicate existing obligations/practice but there is usually a persuasive rationale for doing so. A primary example is the generally State-centric and consent-based approach which is taken to the provision of international assistance. This echoes the approach to assistance taken in a minority protection context but, in so doing, helps reconcile secondary RtoP's assistance component with the principle of friendly relations between States,<sup>1770</sup> at least when it is *the State's* consent that is required. In addition, practice to date suggests that there is a general consensus that the use of armed force under secondary RtoP requires UNSC authority. Whilst this may mean that the legal regime on the use of armed force will remain in the *status quo*, we cannot underestimate the extent to which this helps to make RtoP more politically palatable, especially to States which rejected the wider concept of humanitarian intervention.

Second, existing obligations/practice may be approached more *restrictively* under

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<sup>1769</sup> Bellamy takes a similar view, contending that a fundamental difference between secondary RtoP and humanitarian intervention is that the former does not provide merely a choice 'between sending in the marines and standing aside in the face of humanitarian emergencies'. Bellamy, *The Global Effort to End Mass Atrocities* (n 1446), 98. In contrast, Hannum argues that the interplay between secondary RtoP and the existing regime on the use of armed force (i.e the need for Security Council authority) means that para 139 of the Outcome Document 'does little more than reaffirm relevant provisions of the UN Charter'. Hannum (n 1751), 138.

<sup>1770</sup> OSCE HCNM, Bolzano/Bozen Recommendations (n 1424), 7.



secondary RtoP. The main example of this is the fact that the UNSC have responded to RtoP cases in a graduated manner to date, despite the fact that it can implement Chapter VII enforcement measures non-incrementally. Whilst adopting a graduated approach to its discharge can help to distance secondary RtoP from the idea that armed force will typically be a measure of first resort, it is necessary to ensure that this does not become *exhaustive*, thereby restraining armed force from being used immediately if the protection of a population so demands.

Third, elements of secondary RtoP have the capacity to represent *value added*. For example, secondary RtoP can add value to existing minority protection mechanisms through its specificity. One illustration is secondary RtoP's early warning and assessment component. Secondary RtoP's focus on four specific crimes can help the international community, through the Joint Office on early warning and assessment, to concentrate on those factors which could indicate the perpetration of R2P crimes, irrespective of any nexus to conflict and whether the group at issue is a "national minority" or not. This usefully supplements the early warning systems used in a minority protection context at present, not least that of the OSCE High Commissioner on National Minorities.

The fourth dimension to the relationship is that it is yet *evolving*. Essentially, it seems that as secondary RtoP develops the more complex its relationship with existing obligations becomes and, to the present author, these complexities require deeper reflection by policymakers in future practice. To this effect, practice to date raises significant questions regarding whether it is possible for secondary RtoP's assistance component to always be discharged in full conformity with the principle of neutrality in civil wars, not least when the perpetration of RtoP crimes by the existing government triggers an armed insurrection. Furthermore, the approaches taken to the recipients of assistance in the case studies of the Côte d'Ivoire, Libya and Syria open up the possibility that the traditional approach of State consent to external assistance may not be routinely followed in certain RtoP contexts. Secondary RtoP's interaction with regime change is undoubtedly a thorny issue but, nevertheless, an issue which must be directly considered in future practice. In addition, to consideration of whether regime change can be anything but an inevitable consequence of secondary RtoP's discharge and, in what contexts this is a permissible outcome, there is a need to examine whether those who are subsequently recognised as the legitimate national authorities of the State will actually be able and willing to discharge their primary RtoP duty, including toward minorities. Consideration should include questions, such as whether leaving the responsibility for ensuring populations' protection in 'post-trauma'<sup>1771</sup> contexts to States' national authorities replaces the "responsibility to rebuild" effectively. Is it possible

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<sup>1771</sup> UNSG 2009 Report, Implementing RtoP (n 1342), 21.

that, at least in some cases, the new national authorities may be “unable or unwilling” to do more than simply turn a blind-eye to these occurrences?

Secondary RtoP’s multifaceted relationship with existing obligations/practice raises significant questions with respect to the *legal status* of RtoP. Is there any support for secondary RtoP creating *new legal provisions* for the use of armed force? Can the UNSC’s failure to discharge secondary RtoP, including through vetoing proposed protective action, entail legal responsibility? Is secondary RtoP best characterised as a *right, duty* or *responsibility* to protect? These and other significant legal questions form the basis of the following chapter.

# CHAPTER VI

## THE LEGAL STATUS AND CHARACTER OF PRIMARY AND SECONDARY RtoP

### ANOTHER CASE OF LEGITIMACY vs. LEGALITY?

#### Introduction

At the 2005 World Summit the Outcome Document<sup>1772</sup> was adopted by consensus, without a vote.<sup>1773</sup> No State<sup>1774</sup> indicated that they considered the Outcome Document to formulate primary or secondary RtoP as a legally binding obligation. Nonetheless, several States<sup>1775</sup> suggested that both responsibilities subsume a variety of States obligations under existing treaty and customary international law. This chapter therefore examines whether there is support for *reinterpreting* existing treaty obligations or customary international law in light of subsequent practice<sup>1776</sup> regarding primary and secondary RtoP and, if so, which. It also explores whether there is any evidence in subsequent practice to suggest that primary and

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<sup>1772</sup> UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, paras 138-140. (Outcome Document).

<sup>1773</sup> It is not necessary to discuss the complex and lengthy negotiations on the drafting of the substantive aspects of the Outcome Document as these have been outlined throughout the preceding chapters and, furthermore, at length in the literature. See particularly, A Bellamy, *The Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press, Cambridge 2009) 83-97; E Strauss, *The Emperor's New Clothes? The United Nations and the Implementation of the Responsibility to Protect* (Nomos, Baden Baden 2009) 11-18; E C Luck, "Sovereignty, Choice and the Responsibility to Protect" and E Strauss, "A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect" in A Bellamy, S E Davies and L Glanville (eds), *The Responsibility to Protect and International Law* (Martinus Nijhoff Leiden 2011) 20-24 (Luck) and 27-34 (Strauss).

<sup>1774</sup> All State views given at the World Summit are detailed in Annex I (e).

<sup>1775</sup> See especially: Statements of the Representatives of the *Marshall Islands* and *Sweden* to the UNGA, 'High-Level Meeting of the Plenary' (19 April 2005) and Statement of the Representative of *Guatemala* to the UNGA, 'High-Level Meeting of the Plenary' (20 April 2005). Statements delivered in *April 2005* are available at <[http://old.reformtheun.org/index.php/government\\_statements/c304?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c304?theme=alt2)> accessed 7 August 2012 (April 2005 State Views). Statements of the Representatives of *Peru, Canada, Chile, Croatia, Pakistan, France, Algeria, New Zealand* and *South Africa* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005); Statements of the Representatives of *Brazil, the United States, the United Kingdom, Andorra* to the UNGA, 'High-Level Meeting of the Plenary' (22 June 2005); Statements of the Representatives of *Sri Lanka, Tanzania* and *Viet Nam* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005) and Statement of the Representative of *Spain* to the UNGA, 'High-Level Meeting of the Plenary' (1 July 2005). Statements delivered in June-July 2005 are available at <[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 7 August 2012 (June-July 2005 State Views). Statement of the Representative of *Brazil* to the UNGA, 'High-Level Meeting of the Plenary' (1 August 2005) and Statement of the Representative of *Indonesia* to the UNGA, 'High-Level Meeting of the Plenary' (August 2005). Statements delivered in August 2005 are available at <[http://old.reformtheun.org/index.php/government\\_statements/c427?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c427?theme=alt2)> accessed 7 August 2012 (August 2005 State Views). August statements are also summarised in World Federalist Movement, 'State-by-State Positions on the Responsibility to Protect' (11 August 2005) <<http://www.responsibilitytoprotect.org/index.php/document-archive/civil-society?view=fjrelated&id=2411>> accessed 7 August 2012 (WFM Report).

<sup>1776</sup> Article 31 (3) of the Vienna Convention on the Law of Treaties 1969 permits agreements between State parties to a treaty to 'be taken into account' when interpreting the treaty provision. On the use of subsequent State practice as interpretive aides generally. See Vienna Convention on the Law of Treaties 1969 (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31 (3) and V Lowe, *International Law* (OUP, Oxford 2007) 92.

secondary RtoP, or elements thereof, have become *new customary international law*.<sup>1777</sup> It further considers whether the Outcome Document could be an instrument of *soft law*.<sup>1778</sup>

The chapter draws extensively upon trends in practice regarding the legal status and character of primary and secondary RtoP. This includes over four hundred State views<sup>1779</sup> on RtoP surveyed by this writer, delivered during the (i) Outcome Document's drafting and adoption;<sup>1780</sup> (ii) 2005-2011 UN Security Council [UNSC] meetings regarding the Protection of Civilians in Armed Conflict;<sup>1781</sup> (iii) 2006-2011 opening sessions of the UN General Assembly [UNGA];<sup>1782</sup> and (iv) 2009-2011 annual UNGA thematic debates on RtoP.<sup>1783</sup> The chapter also utilises this writer's comprehensive review of State positions regarding primary and secondary RtoP in national,<sup>1784</sup> regional<sup>1785</sup> and global<sup>1786</sup> practice since 2005.

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<sup>1777</sup> In wider international legal discourse there is debate over the process through which customary international law is created. The merits of this debate fall beyond the scope of this chapter. Here, it is sufficient to note that this chapter will examine the formation of customary international law in accordance with the *traditional* school of thought on the subject, examining the State practice that exists and whether or not this practice has been accompanied by evidence of *opinio juris*. This writer would argue that adopting this approach can help to ensure that the analysis of RtoP's status as a rule of customary international law is (i) legally accurate (i.e. not conflating the formation of customary international law and General Principles of international law); and (ii) legitimate (i.e. taking into account State views as a whole, not merely a selection of those who provide *opinio juris*). For a good overview of this debate and its merits and demerits, see particularly A Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757. On the formation of new customary international law, see generally H Thirlway, 'The Sources of International Law' in M Evans (ed), *International Law* (2nd edn OUP, Oxford 2006) 124; Lowe, *International Law*, *ibid*, 47-55; R Higgins, 'The United Nations and Lawmaking: The Political Organs' (1970) 64 Am. Soc'y Int'l L. Proc. 37 and M Akehurst and P Malanczuk (eds), *Akehurst's Modern Introduction to International Law* (7th edn Routledge, London 1997) 44. For judicial pronouncement on the requirements for the formation of new customary international law, see particularly *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits, Judgment*, ICJ Reports 1986 at 14, para 186; *North Sea Continental Shelf, Judgment*, ICJ Reports 1969 at 3, para 77 and, further, at 43.

<sup>1778</sup> On this see generally, C Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 ICLQ 850; A Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 (4) ICLQ 901 and A Boyle, 'Soft Law in International Law Making' in Evans, *International Law*, *ibid*, 141-58. In the specific context of RtoP see e.g. G Shaffer and M Pollack, 'Hard Versus Soft Law in International Security' (2011) 52 Boston College Law Review 1147; Strauss, 'A Bird in the Hand is Worth Two in the Bush' (n 1773), 33; J Welsh and M Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities' in Bellamy, Davies and Glanville (n 1773) 135-37; C Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 (1) AJIL 99, 118; N Oman, 'The 'Responsibility to Prevent': A Remit for Intervention?' (2009) 22 Can. J. L. & Jurisprudence 355, 355.

<sup>1779</sup> The State views drawn upon in this chapter are detailed in Annex I (a)-(i).

<sup>1780</sup> State views given at these debates are detailed in Annex I (a)-(e).

<sup>1781</sup> State views given at these debates are detailed in Annex I (i).

<sup>1782</sup> State views given at these debates are detailed in Annex I (h).

<sup>1783</sup> State views given at these debates are detailed in Annex I (g) (i)-(iii).

<sup>1784</sup> This includes Federal Ministry of Defence, 'White Paper 2006 on German Security Policy and the Future of the Bundeswehr' (2006), 44 (Federal Ministry of Defence, 'White Paper 2006 on German Security Policy and the Future of the Bundeswehr'); UK Cabinet Office, 'The National Security Strategy of the United Kingdom: Security in an Interdependent World' (March 2008), 48 (Cabinet Office, 'The National Security Strategy of the United Kingdom: Security in an Interdependent World'); Presidency de la Republique, 'The French White Paper on Defence and National Security' (June 2008), 9 (Presidency de la Republique, 'The French White Paper on Defence and National Security'); Norwegian Ministry of Foreign Affairs, 'Norway's Humanitarian Policy' (Report No.40 to the Storting, 2008-2009), 28 (Norwegian Ministry of Foreign Affairs, 'Norway's Humanitarian Policy') and Norwegian Ministry of Foreign Affairs, 'Climate, Conflict and Capital: Norwegian Development Policy Adapting to Change' (Report No. 13 to the Storting, 2008-2009), 68 (Norwegian Ministry of Foreign Affairs, 'Climate, Conflict and Capital: Norwegian Development Policy Adapting to Change'). All policies are available at <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 10 October 2011.

<sup>1785</sup> This includes European Parliament Res, 'On the Southern Neighbourhood and Libya in particular' (10 March 2011) EP Doc P7\_TA(2011)0095; European Parliament Resolution, 'The Situation in Zimbabwe' (18 December

Parts one and two consider primary and secondary RtoP's legal status respectively. It is argued that examination of State views and practice suggests three phases of development. In terms of primary RtoP, the three phases are (i) creation (2005-2006); (ii) refinement (2007-2008); and (iii) implementation (2009-2012). In relation to secondary RtoP, the position is somewhat different. Although there is increasing State practice to suggest a move toward implementation, elements of State views and practice suggest that refinement continues. The three phases used in this case are therefore (i) creation (2005-2006); (ii) refinement (2007-2008); and (iii) continued refinement and moves toward implementation (2009-2012). Each phase outlines the trends which have emerged in State views and practice which bear significance on primary and secondary RtoP's legal status. Four questions are addressed. First, do primary and/or secondary RtoP represent *new* legal obligations? Is the State practice widespread and consistent and accompanied by evidence of *opinio juris* so as to argue that both responsibilities have become new customary international law? Second, do primary and/or secondary RtoP subsume obligations under existing treaty and customary international law? Is the legal significance of both responsibilities therefore limited to the fact that they subsume existing legal obligations and, therefore, entail legally binding elements? Third, does the legal significance of primary and/or secondary RtoP reside in their capacity to generate new interpretations of existing treaty obligations and/or rules of customary international law that they subsume? Is there, for example, evidence to support reinterpreting existing treaty obligations, such as those under the UN Charter, in light of the subsequent State practice regarding primary and secondary RtoP? Fourth, is the Outcome Document best explained as an instrument of soft law which we should interpret existing obligations in accordance with? If so, is there scope to suggest that primary and/or secondary

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2008) EP Doc P6\_TA(2008)0640; European Parliament Resolution, 'The Situation in Darfur' (28 September 2006) EP Doc P6\_TA(2006)0387; European Parliament Resolution, 'Situation in Syria, Bahrain and Yemen in the Context of the Situation in the Arab World and North Africa' (7 July 2011) EP Doc P7\_TA(2011)0333; European Parliament Resolution, 'Expulsion of NGO's from Darfur' (12 March 2009) EP Doc. P6\_TA(2009)0145; European Parliament Resolution, 'The Tragic Situation in Burma' (22 May 2008) EP Doc. P6\_TA(2008)0231 (European Parliament Resolution, 'The Tragic Situation in Burma') and ECOWAS, 'Final Communiqué of the Extraordinary Session of the Authority of Heads of State and Government on the Côte d'Ivoire' (24 December 2010) No. 192/2010.

<sup>1786</sup> This includes UNGA Res 63/308 (14 September 2009) UN Doc A/RES/63/308; UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 (UNSC Res 1674); UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894; UN, 'Outcome Document of the Durban Review Conference' (24 April 2009)

<<http://www.un.org/durbanreview2009/>> accessed 24 November 2011; UNSC Res 1755 (20 April 2007) UN Doc S/RES/1755; UNSC Res 1706 (31 August 2006) S/RES/1706 (2006) (UNSC Res 1706); UNSC Res 1769 (31 July 2007) UN Doc S/RES/1769; UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 (UNSC Res 1970); UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (UNSC Res 1973); UNHRC Res S-15/1, 'The Situation of Human Rights in the Libyan Arab Jamahiriya' (25 February 2011) UN Doc A/HRC/S-15/1, para 2 (UNHRC Res S-15/1); UNHRC Res S-16/1, 'The Current Human Rights Situation in the Syrian Arab Republic in the Context of Recent Events' (29 April 2011) UN Doc A/HRC/RES/S-16/1, para 1 (UNHRC Res S-16/1); UN Press Release, 'Human Rights Council Debates Situation of Human Rights in Syrian Arab Republic' (22 August 2011) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11324&LangID=E>> accessed 14 November 2011 (UN Press Release, 'Human Rights Council Debates Situation of Human Rights in Syrian Arab Republic'); UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur' (9 March 2007) UN Doc A/HRC/4/80 (UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur').

RtoP have become political or moral obligations? What are the implications of this? Could it strengthen claims that action which is not pursuant to international law is at least morally and/or politically legitimate?

Part three utilises the findings made in the preceding sections to examine what *character* primary and secondary RtoP have, or could have. Have primary and secondary RtoP been formulated as duties, rights, permissions and/or responsibilities to protect? If formulated as “responsibilities”, should we understand the “responsibility” in accordance with its traditional public international law meaning as responsibility for an internationally wrongful act? Alternatively, is there scope to suggest that “responsibility” may be used in a more novel sense, such as in a manner akin to the notion of “responsibility” emerging in a business and human rights context?<sup>1787</sup>

## 1 The Legal Status of Primary RtoP

### 1.1 The Creation Phase (2005)

The period between April and December 2005 largely focused upon creating primary RtoP as a responsibility which States would commit to ‘act in accordance with’.<sup>1788</sup> State views during the drafting of the Outcome Document,<sup>1789</sup> and at its adoption,<sup>1790</sup> suggest that developing consensus about primary RtoP was relatively uncontroversial. State views point to one explanation for this. Primary RtoP was considered to subsume, not expand, the *existing* legal duties that States owed to their populations. To this effect, several States expressly<sup>1791</sup> or impliedly<sup>1792</sup> explained that primary RtoP subsumes States existing legal

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<sup>1787</sup> UNHRC, ‘Protect, Respect, Remedy: A Framework for Business and Human Rights’ (7 April 2008) UN Doc A/HRC/8/5. (UNHRC, ‘Framework for Business and Human Rights’).

<sup>1788</sup> Outcome Document (n 1772), para 138.

<sup>1789</sup> State views are detailed in Annex I (a).

<sup>1790</sup> State views are detailed in Annex I (b).

<sup>1791</sup> Peru is a good example. It argued that States which ‘violate the Geneva Convention, the Convention against Genocide and the international humanitarian law also violate the international law and can be intervened by the United Nations’. This suggests that Peru considered primary RtoP to subsume States duties under both treaty (e.g. Geneva Convention and Genocide Convention) and customary international law (e.g. the general reference to ‘international humanitarian law’). Statement of the Representative of *Peru* to the UNGA, June 2005 State Views (n 1780). See further, Statements of the Representatives of *Canada, Chile, Croatia, Brazil and Pakistan* to the UNGA, June 2005 State Views (n 1775).

<sup>1792</sup> Other States touched upon primary RtoP as that which subsumes States existing legal obligations by the *language* which they used. For example, the United States commented that the idea that States owed a responsibility to protect its population was ‘a given’, whilst the Marshall Islands suggested that the primary responsibility to protect populations ‘will always *remain* a national’ one. Statements of the Representatives of the *Marshall Islands, Sweden and Guatemala* to the UNGA, ‘High-Level Meeting of the Plenary’ (April 2005), April 2005 State Views (n 1775); Statements of the Representatives of *South Africa, New Zealand and Algeria* to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005); Statements of the Representatives of the *United States, United Kingdom, Andorra and Korea* to the UNGA, ‘High-Level Meeting of the Plenary’ (22 June 2005) and Statements of the Representatives of *Sri Lanka, Tanzania and Viet Nam* to the UNGA, ‘High-Level Meeting of the Plenary’ (30 June 2005), June 2005 State Views (n 1775); Statement of the Representative of *Spain* to the

duties, particularly those under criminal, humanitarian and human rights law instruments. Indeed, the US<sup>1793</sup> and Pakistan<sup>1794</sup> proposed altering the draft language on primary RtoP to one clearly denoting that primary RtoP *subsumes* States existing legal duties. The US suggested that the draft be altered to simply ‘underscore’<sup>1795</sup> that States owe their populations protective duties. Pakistan went further, arguing that it was ‘evident’<sup>1796</sup> that States already owe their populations protective legal duties and that this should be emphasised. This writer considers that the US and Pakistan’s recommendations may be explained in one of two ways. The first possibility is that these States were clarifying that they did not intend for the Outcome Document’s primary RtoP provisions to create new customary international law. Second, these States may have been concerned that the draft language on primary RtoP could suggest a willingness by States to reinterpret existing treaty provisions, not least that States accept that a failure to fulfil their existing protective duties effectively can activate peaceful or non-peaceful responsive measures under secondary RtoP. In fact, the way in which primary RtoP could create this reinterpretation was alluded to by States like Brazil.<sup>1797</sup> Brazil stressed that the interplay between a failure to fulfil primary RtoP and secondary RtoP’s activation helps to ensure that States implement their existing humanitarian law duties more effectively.<sup>1798</sup>

Similar trends regarding primary RtoP’s legal status arose in the wider State practice

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UNGA, ‘High-Level Meeting of the Plenary’ (1 July 2005), July 2005 State Views (n 1775); Statement of the Representative of *Brazil* to the UNGA, ‘High-Level Meeting of the Plenary’ (1 August 2005), August 2005 State Views (n 1775) and Statement of the Representative of *Indonesia* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005), WFM Report (n 1775).

<sup>1793</sup> Letter of the US Ambassador, John Bolton, to the President of the UNGA (30 August 2005)

<[http://www.reformtheun.org/index.php?option=com\\_docman&task=cat\\_view&gid=15&limit=15&limitstart=0&order=date&dir=ASC&category=9&Itemid=240](http://www.reformtheun.org/index.php?option=com_docman&task=cat_view&gid=15&limit=15&limitstart=0&order=date&dir=ASC&category=9&Itemid=240)> accessed 14 May 2012 (Letter of the US Ambassador, John Bolton). [‘With respect to the first sentence of paragraph 118, we agree that the host state has a responsibility to protect its populations from such atrocities, and we agree in a more general and moral sense that the international community has a responsibility to act when the host state allows such atrocities. But the responsibility of the other countries in the international community is not of the same character as the responsibility of the host, and we thus want to avoid formulations that suggest that the other countries are inheriting the same responsibility that the host state has. The text should reflect this view’. It proposed altering the language to from noting that primary RtoP lay ‘first and foremost with each individual State’ to ‘underscore’ that ‘each State is responsible’ for protecting its populations.] Chapter two discussed the broader significance of this statement in terms of the primary RtoP bearer.

<sup>1794</sup> Statement of the Representative of *Pakistan* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005). WFM Report (n 1775).

<sup>1795</sup> Letter of the US Ambassador, John Bolton (n 1793), 3.

<sup>1796</sup> Statement of the Representative of *Pakistan* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005). WFM Report (n 1775).

<sup>1797</sup> Statement of the Representative of *Brazil* to the UNGA, ‘High-Level Meeting of the Plenary’ (22 June 2005), June 2005 State Views (n 1775). Guatemala is a further illustration. It focused upon primary RtoP’s impact upon the existing international human rights law obligations States owe to their populations. It argued that primary RtoP was a fundamental responsibility of States which strengthened their implementation of international human rights law obligations. Although Guatemala did not expressly elaborate on why it considered primary RtoP to strengthen the implementation of these existing obligations, we could suggest that it was alluding to the interplay between primary and secondary RtoP as a new, strengthening interpretation of States accountability for a failure to fulfil these obligations. Statement of the Representative of *Guatemala* to the UNGA, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.7

<sup>1798</sup> Statement of the Representative of *Brazil* to the UNGA, ‘High-Level Meeting of the Plenary’ (22 June 2005), June 2005 State Views (n 1775).

which occurred during this phase. In the UNSC, States and other relevant actors<sup>1799</sup> affirmed that primary RtoP subsumes States legal duties under existing treaty and customary international law. For example, Luxembourg, speaking on behalf of the European Union, noted that primary RtoP ‘reaffirms’<sup>1800</sup> States existing humanitarian and human rights law obligations. This statement should be given particular weight because it was made on behalf of a prominent regional organisation and should therefore be taken to reflect the position of its Member States. This trend in the views of States and other relevant actors suggests that primary RtoP was recognised to entail legally binding elements but that, over this phase, there was no support for primary RtoP having become new customary international law.

States<sup>1801</sup> also elaborated on the specific humanitarian and criminal law duties which primary RtoP subsumes. These included States duties under the Geneva Conventions to permit access to humanitarian agencies and to protect civilians.<sup>1802</sup> Norway<sup>1803</sup> and Panama<sup>1804</sup> focused upon primary RtoP’s interplay with international criminal law. Norway<sup>1805</sup> highlighted that RtoP crimes are in practice often committed not only by non-State actors but by national authorities who, Norway stressed, ‘have [the] primary responsibility to protect’.<sup>1806</sup> Recognition of primary RtoP subsuming existing human rights, criminal and humanitarian law duties alludes to primary RtoP’s capacity to create new interpretations of States existing treaty duties. Given the interplay between a failure to fulfil primary RtoP and secondary RtoP’s activation, this trend in State views suggests growing consensus that such crimes incur not only individual criminal accountability (e.g. under the Rome Statute) but, rather, activate peaceful or non-peaceful international responses under secondary RtoP. Accordingly, there appears to have been growing recognition during this phase that (i) primary RtoP is an obligation of States; and (ii) secondary RtoP represents a new way of promoting and ensuring States compliance with the existing legal duties that primary RtoP subsumes.

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<sup>1799</sup> See e.g. Statements of the Representatives of *Peru*, *Luxembourg (on behalf of the European Union)*, *Norway* and *Panama* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209.

<sup>1800</sup> Statement of the Representative of *Luxembourg (on behalf of the European Union)* to the UNSC, *ibid.*

<sup>1801</sup> See particularly the Statements of the Representatives of *Peru*, *Norway* and *Panama* to the UNSC, *ibid.* and Statement of the Representative of *Congo* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476.

<sup>1802</sup> *Peru* specified that primary RtoP subsumes the obligation to permit access to humanitarian agencies and to protect civilians, particularly the most vulnerable such as women, children, refugees and IDP’s. *Congo* supplemented this by stating that national authorities are obligated to ‘guarantee access for humanitarian personnel to populations in need’. Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319 and Statement of the Representative of *Congo* to the UNSC, *ibid.*

<sup>1803</sup> Statement of the Representative of *Norway* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209.

<sup>1804</sup> Statement of the Representative of *Panama* to the UNSC, *ibid.*

<sup>1805</sup> Statement of the Representative of *Norway* to the UNSC, *ibid.*

<sup>1806</sup> Statement of the Representative of *Norway* to the UNSC, *ibid.* Panama also noted that primary RtoP subsumed existing international criminal law obligations, specifically those identifying sexual crimes as crime against humanity. It argued that ‘sexual violence against women as a tool of war or simple political pressure’ could constitute a manifest failure to fulfil primary RtoP and thereby activate secondary RtoP. Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319



## 1.2 The Refinement Phase (2006 - 2008)

During this phase, there was limited discussion among States regarding their implementation of primary RtoP at national level to protect their own populations. However, Timor-Leste<sup>1807</sup> later explained that it had implemented primary RtoP during this period. At the 2009 UNGA thematic debate on RtoP, Timor-Leste<sup>1808</sup> explicitly referred to its national authorities' implementation of primary RtoP during its 2006 crises. Timor-Leste explained that primary RtoP was fulfilled by (i) recognising that the State could not effectively protect its population alone; and (ii) requesting neighbouring States to provide it with assistance to do so.<sup>1809</sup> Notably, Timor-Leste acknowledged that the situation had not involved RtoP crimes.<sup>1810</sup> Thus, expressly referring to primary RtoP's implementation suggests that Timor-Leste considered that this incurred an obligation to take steps to *prevent* RtoP crimes, including by requesting assistance.

Significantly, Timor-Leste stated that it discharged primary RtoP because of the 'legal and moral obligation to protect'<sup>1811</sup> owed to its population. It is quite likely that the source of the legal and moral obligation Timor-Leste refers to could be States duties under human rights law that primary RtoP subsumes. Although existing treaty and customary international law do not *legally obligate* States to request the assistance of third States to protect their population, primary RtoP's preventive component clearly overlaps with States existing human rights law duties. For example, States are required to protect and ensure the right to life but they have a margin of appreciation with the specific means used to fulfil this duty. Arguably, Timor-Leste may have simply utilised this margin of appreciation by requesting assistance. Timor-Leste's further comments strengthen this interpretation of its statement, specifically that (i) the assistance enabled the 'realisation of human rights'<sup>1812</sup> in the State; and (ii) a breach of primary RtoP can arise when there is 'a clear failure to meet obligations *relating to* the responsibility to protect'.<sup>1813</sup> Thus, Timor-Leste adds weight to States recognising primary RtoP as an obligation of States which entails legally binding elements but does not in itself impose new legal obligations.

In the latter part of this phase, the UN Human Rights Council [UNHRC] used RtoP as a framework for assessing the human rights situation in Darfur.<sup>1814</sup> The Report noted that

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<sup>1807</sup> Statement of *Timor-Leste* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

<sup>1808</sup> Statement of *Timor-Leste* to the UNGA, *ibid.*

<sup>1809</sup> Statement of *Timor-Leste* to the UNGA, *ibid.*

<sup>1810</sup> Statement of *Timor-Leste* to the UNGA, *ibid.*

<sup>1811</sup> Statement of *Timor-Leste* to the UNGA, *ibid.*

<sup>1812</sup> Statement of *Timor-Leste* to the UNGA, *ibid.*

<sup>1813</sup> Statement of *Timor-Leste* to the UNGA, *ibid.*

<sup>1814</sup> UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur' (n 1786). On this see generally, Bellamy, *The Global Effort to End Mass Atrocities* (n 1778), 125-127; Strauss, "A Bird in the Hand is Worth Two in the Bush" (n 1773), 42-26 and, further, Strauss, *The Emperor's New Clothes?* (n 1773), 63-68.

Sudan had accepted the RtoP framework at the Summit.<sup>1815</sup> Based on the presence of RtoP crimes in Darfur, the Report concluded that the Sudanese government had violated primary RtoP and, therefore, encouraged the international community to discharge secondary RtoP.<sup>1816</sup> This was challenged by Sudan,<sup>1817</sup> Pakistan (on behalf of the Organisation of the Islamic Conference)<sup>1818</sup> and Algeria (on behalf of the Arab League).<sup>1819</sup> We should attach particular weight to the standpoints of Pakistan<sup>1820</sup> and Algeria<sup>1821</sup> because they were speaking on behalf of two prominent regional organisations and, therefore, their positions reflect those of their Member States. Both voiced concern over the appropriateness of using RtoP as a framework, arguing that this exceeded the mandate given by the UNHRC to the High-Level Mission on the situation of human rights in Darfur.<sup>1822</sup> Furthermore, they stressed that RtoP had ‘multiple political and security dimensions’.<sup>1823</sup> For these reasons, both felt that they could not comment on the Report’s findings. Whilst political reasons quite likely underscored these protests (e.g. OIC and AL members’ strong ethnic and religious ties to the Arabic/Islamic Sudanese government), this writer would suggest that they may have been partly motivated by *legal* considerations. The underlying concern of Algeria and Pakistan and, therefore the regional organisations that they were representing, seemed to be that the Report entailed the implication that primary RtoP created a new interpretation of States existing human rights treaty obligations, specifically that a State’s violation of its existing obligations could activate secondary RtoP. The broader context supports this interpretation. The UNHRC Report on Darfur was released approximately six months *after* the Sudanese government rejected UNSC Resolution 1706.<sup>1824</sup> The Report noted the UNSC’s authorisation for the deployment of peacekeepers in Resolution 1706 as an example of the ‘international

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<sup>1815</sup> UNHRC, ‘Report of the High-Level Mission on the Situation of Human Rights in Darfur’, *ibid*, 9. [‘[t]he Sudan joined in the adoption of the World Summit Outcome Document, explicitly accepting its responsibility to protect and pledging to act in accordance with it. With its ratification of various human rights and humanitarian law treaties it has also accepted specific legal obligations that underpin this responsibility’].

<sup>1816</sup> UNHRC, ‘Report of the High-Level Mission on the Situation of Human Rights in Darfur’, *ibid*, 25 [‘The Mission further concludes that the Government of the Sudan has manifestly failed to protect the population of Darfur from large-scale international crimes, and has itself orchestrated and participated in these crimes. As such, the solemn obligation of the international community to exercise its *responsibility to protect* has become evident and urgent’, *emphasis original*].

<sup>1817</sup> Statement of the Representative of *Sudan* to the UNHRC in UN Press Release, ‘Human Rights Council Discusses Report of High-Level Mission on Situation of Human Rights in Darfur’ (16 March 2007) UN Doc HRC/07/12

<<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/E6DF2E2811EABFA3C12572A000717B7E?opendocument>> accessed 12 November 2011. (UN Press Release, ‘Human Rights Council Discusses Report of High-Level Mission on Situation of Human Rights in Darfur’).

<sup>1818</sup> Statement of the Representative of *Pakistan (on behalf of the Organisation of the Islamic Conference)* to the UNHRC, *ibid*.

<sup>1819</sup> Statement of the Representative of *Algeria (on behalf of the Arab League)* to the UNHRC, *ibid*.

<sup>1820</sup> Statement of the Representative of *Pakistan (on behalf of the Organisation of the Islamic Conference)* to the UNHRC, *ibid*.

<sup>1821</sup> Statement of the Representative of *Algeria (on behalf of the Arab League)* to the UNHRC, *ibid*.

<sup>1822</sup> Statements of the Representatives of *Pakistan (on behalf of the Organisation of the Islamic Conference)* and *Algeria (on behalf of the Arab League)* to the UNHRC, *ibid*.

<sup>1823</sup> Statements of the Representatives of *Pakistan (on behalf of the Organisation of the Islamic Conference)* and *Algeria (on behalf of the Arab League)* to the UNHRC, *ibid*.

<sup>1824</sup> UNSC Res 1706 (n 1786).

community's responsibility to protect'.<sup>1825</sup> Furthermore, the Report encouraged the UNSC to make further attempts to secure this deployment and recommended the application of targeted sanctions.<sup>1826</sup> Accordingly, approving the Report could have suggested that these actors supported reinterpreting States existing treaty obligations as that which, when violated in the context of primary RtoP, activates peaceful and non-peaceful responsive measures under secondary RtoP.<sup>1827</sup>

Over this phase, States<sup>1828</sup> gave particular attention to refining the nature and scope of the existing legal duties which primary RtoP subsumes. For example, Croatia<sup>1829</sup> stressed that primary RtoP encompassed existing obligations regarding the use of child soldiers in armed conflict. Denmark<sup>1830</sup> stood alone in alluding to the way in which primary RtoP could generate new customary international law or otherwise progressively develop international law. Denmark rejected the argument that the Sudanese government's rights to sovereignty and non-interference were being violated by ongoing attempts to secure a peacekeeping force in the region,<sup>1831</sup> arguing instead that 'it is the right of the population of Darfur to get protection that is being violated'.<sup>1832</sup> The latter alludes to the possibility that primary RtoP could, over time, progressively develop existing international law by evolving into a *collective right of populations to protection*.<sup>1833</sup> Arguably, Denmark alludes to the possibility that primary RtoP reformulates the existing legal rights of populations as a general collective right to protection, a right which the international community has an interest in protecting under secondary RtoP. Essentially, Denmark's view opens up the possibility that primary RtoP not only collectively repackages States legal duties but also the legal rights of members

<sup>1825</sup> UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur' (n 1817), 20.

<sup>1826</sup> UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur', *ibid*, 27.

<sup>1827</sup> At a political level, there may have been concern over the fact that the UNSC tends to attach particular weight to the Reports and findings of the Human Rights Council and the views of relevant regional organisations when applying Chapter VII enforcement measures. For example, UNSC Resolution 1970 authorising the application of sanctions and a referral of the situation in Libya to the ICC explicitly welcomes 'the Human Rights Council resolution A/HRC/S-15/2 of 25 February 2011, including the decision to urgently dispatch an independent international commission of inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, to establish the facts and circumstances of such violations and of the crimes perpetrated, and where possible identify those responsible'. UNSC Res 1970 (2011) (n 1786), para 5, *emphasis original*.

<sup>1828</sup> See for example, Statement of the Representative of *Croatia* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898; Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703; Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781; Statement of the Representative of *Slovenia (on behalf of the European Union)* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898; Statement of the Representative of *Australia* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898; Statement of the Representative of *Mexico* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703; Statement of the Representative of *Nigeria* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703.

<sup>1829</sup> Statement of the Representative of *Croatia* to the UNSC, *ibid*.

<sup>1830</sup> Statement of the Representative of *Denmark* to the UNGA in UNGA, 'Opening of the Sixty First Session of the UN General Assembly' (September 2006) <<http://www.un.org/webcast/ga/61/index.shtml>> accessed 14 October 2011.

<sup>1831</sup> Statement of the Representative of *Denmark* to the UNGA, *ibid*.

<sup>1832</sup> Statement of the Representative of *Denmark* to the UNGA, *ibid*.

<sup>1833</sup> The potential for primary RtoP to develop to entail a collective right to protection was discussed at length in chapter three.

of States' populations (i.e. as a collective right to protection). However, chapter three observed (i) that there is presently limited State support for this reinterpretation of existing human rights; and (ii) that Pakistan<sup>1834</sup> and Algeria's<sup>1835</sup> standpoints on the UNHRC's Darfur Report suggest that the development of a collective right of populations to protection, enforceable through the UNHRC, would generate protest among some States and regional organisations. Accordingly, the more persuasive explanation for the collective right to protection alluded to by Denmark is that it represents shorthand for the existing human rights of members of States' populations which primary RtoP subsumes.

### 1.3 The Implementation Phase (2009 onward)

In 2009, there was a strong shift toward implementing primary RtoP. Most notably, the UN Secretary-General [UNSG] followed up on the Outcome Document commitment for the UNGA to continue considering RtoP,<sup>1836</sup> organising a thematic debate in the UNGA on RtoP's *implementation* where States could consider his Report on the topic.<sup>1837</sup> This signalled a major step from viewing primary RtoP as a *principle* to an *obligation* which could and should be implemented in practice.

Examination of State views reveals that no State expressly considered primary RtoP to represent a new legal obligation during this period. Accordingly, no evidence of *opinio juris* emerged over this period to suggest that States recognise primary RtoP to have become new customary international law. Indeed, some States<sup>1838</sup> seemed to reject the possibility that the Outcome Document's primary RtoP provisions impose new legal obligations on States. The Republic of Korea<sup>1839</sup> did so most clearly, arguing that primary RtoP was 'just a restatement of the positive binding obligation of States to protect their populations from the four crimes enumerated therein'.<sup>1840</sup> Similarly, Brazil<sup>1841</sup> stated primary RtoP was 'not a principle proper,

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<sup>1834</sup> Statement of the Representative of Pakistan (*on behalf of the Organisation of the Islamic Conference*) to the UNHRC in UN Press Release, 'Human Rights Council Discusses Report of High-Level Mission on Situation of Human Rights in Darfur' (n 1817).

<sup>1835</sup> Statement of the Representative of Algeria (*on behalf of the Arab League*) to the UNHRC in UN Press Release, 'Human Rights Council Discusses Report of High-Level Mission on Situation of Human Rights in Darfur', *ibid*.

<sup>1836</sup> Outcome Document (n 1772), para 139.

<sup>1837</sup> Report of the UNSG, 'Implementing the Responsibility to Protect' (12 January 2009) UN Doc A/63/677, 2. (UNSG Report 2009, Implementing RtoP).

<sup>1838</sup> These include: Statement of the *Republic of Korea* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97; Statement of *Brazil* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97; Statement of *Switzerland* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statement of *Chile* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statement of *Uruguay* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 and the Statement of the *Netherlands* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

<sup>1839</sup> Statement of the *Republic of Korea* to the UNGA, *ibid*.

<sup>1840</sup> Statement of the *Republic of Korea* to the UNGA, *ibid*.

<sup>1841</sup> Statement of *Brazil* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

much less a novel legal prescription<sup>1842</sup> but, rather, a ‘powerful political call for all States to abide by legal obligations already set forth in the Charter, in relevant human rights conventions and in international humanitarian law and other instruments’.<sup>1843</sup> This suggests that Brazil considered primary RtoP to represent a *political obligation* and, furthermore, that the Outcome Document was an instrument of *soft law* which could influence States to implement their existing treaty and customary international law duties more effectively.<sup>1844</sup> Chile<sup>1845</sup> echoed this view, noting that the discussion of RtoP should not be a ‘legal one’<sup>1846</sup> but, rather, a ‘political debate, with moral connotations’,<sup>1847</sup> recognising that primary RtoP ‘rests on long-standing obligations under international law’.<sup>1848</sup> Chile therefore appeared to interpret the Outcome Document to be an instrument of *soft law* which politically reinforces States existing legal duties. Whilst Uruguay<sup>1849</sup> endorsed this view, Morocco<sup>1850</sup> focused on excluding arguments that the Outcome Document could be legitimately interpreted as a UNGA Resolution which creates ‘instant customary international law’.<sup>1851</sup> Morocco argued that any such interpretation of the Outcome Document would be wrong at a moral and political level,<sup>1852</sup> thereby restating that the development of customary international law is based upon State consent.<sup>1853</sup>

During the thematic debate, there was also widespread acknowledgment that primary RtoP subsumes States existing legal duties and, therefore, that it entails legally binding elements.<sup>1854</sup> Significantly, this included States like Sri Lanka,<sup>1855</sup> Myanmar,<sup>1856</sup> Iran,<sup>1857</sup>

<sup>1842</sup> Statement of *Brazil* to the UNGA, *ibid*.

<sup>1843</sup> Statement of *Brazil* to the UNGA, *ibid*.

<sup>1844</sup> As noted in chapter three, Switzerland took a similar view, rejecting that primary RtoP could either weaken the existing legal obligations it subsumes or creating legal obligations anew. Instead, Switzerland pointed to primary RtoP having value as soft law by representing an additional mechanism through which to *encourage* States to effectively implement their existing legal obligations. Statement of *Switzerland* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

<sup>1845</sup> Statement of *Chile* to the UNGA, UNGA Meeting Record, *ibid*.

<sup>1846</sup> Statement of *Chile* to the UNGA, *ibid*.

<sup>1847</sup> Statement of *Chile* to the UNGA, *ibid*.

<sup>1848</sup> Statement of *Chile* to the UNGA, *ibid*.

<sup>1849</sup> Statement of *Uruguay* to the UNGA, UNGA Meeting Record, *ibid*.

<sup>1850</sup> Statement of *Morocco* to the UNGA, UNGA Meeting Record, *ibid*.

<sup>1851</sup> On this see e.g. Lowe, *International Law* (n 1776), 41–42.

<sup>1852</sup> Statement of *Morocco* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

<sup>1853</sup> On the consensual nature, see generally A Fohr, *Modern Concepts of Customary International Law as a Manifestation of a Value-Based International Order* (Duncker & Humboldt, Berlin 2006) 21–26 and Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (n 1777), 784.

<sup>1854</sup> This included: Statement of *Sri Lanka* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statement of *Myanmar* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statement of the Representative of *Iran* to the UNGA, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105; Statement of *Nicaragua* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statement of the Representative of *Nicaragua* to the UNGA, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105; Statement of the Representative of *the Netherlands* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1); Statement of the Representative of *Ukraine* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1); Statement of the Representative of *Italy* to the UNGA, UNSC Verbatim Record (23 July 2009) UN Doc A/63/PV.97; Statement of the Representative of *Guatemala* to the UNSC, UNSC Verbatim Record (26 June 2009) UN Doc S/PV.6151 (Res.1).

<sup>1855</sup> Statement of the Representative of *Sri Lanka* to the UNGA, *ibid*.

<sup>1856</sup> Statement of the Representative of *Myanmar* to the UNGA, *ibid*.

Sudan,<sup>1858</sup> Nicaragua<sup>1859</sup> and Venezuela<sup>1860</sup> which, up until this point, had remained relatively silent on primary RtoP. None of these States suggested that primary RtoP imposed any new legal obligations. However, Sudan<sup>1861</sup> endorsed the view that primary RtoP affirms States existing duties to protect populations from ‘humanitarian crimes’.<sup>1862</sup> Furthermore, Nicaragua<sup>1863</sup> acknowledged that primary RtoP affirms that States are obligated to ‘watch over’<sup>1864</sup> their populations ‘by ensuring the rights to life, food, education and health care’.<sup>1865</sup> Recognising that primary RtoP included legally binding obligations was a significant admission for Sudan given the situation in Darfur. This is also true of both Sri Lanka and Myanmar which, in earlier years, were alleged to have breached primary RtoP.<sup>1866</sup> Accordingly, recognition of primary RtoP as an obligation which they owed to their populations carries particular legal significance.

In subsequent State practice during this phase the shift toward implementing primary RtoP became even more apparent. Whilst the primary RtoP duty of Libya and Syria’s national authorities was recalled in UNHRC Resolutions,<sup>1867</sup> the primary RtoP duty of Libya and Yemen’s national authorities was recalled in UNSC Resolution’s 1970,<sup>1868</sup> 1973<sup>1869</sup> and 2014.<sup>1870</sup> No State protested against any of these express references to primary RtoP.<sup>1871</sup> This

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<sup>1857</sup> Statement of the Representative of *Iran* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 and Statement of the Representative of *Iran* to the UNGA, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105.

<sup>1858</sup> Statement of *Nicaragua* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 and Statement of the Representative of *Nicaragua* to the UNGA, UNGA Meeting Record (14 September 2009, UN Doc A/63/PV.105.

<sup>1859</sup> Statement of the Representative of *Sudan* to the UNGA, UNGA Meeting Record (14 September 2009), *ibid*.

<sup>1860</sup> Statement of the Representative of *Venezuela* to the UNGA, UNGA Meeting Record (14 September 2009), *ibid*.

<sup>1861</sup> Statement of the Representative of *Sudan* to the UNGA, UNGA Meeting Record (14 September 2009), *ibid*.

<sup>1862</sup> Statement of the Representative of *Sudan* to the UNGA, *ibid*.

<sup>1863</sup> Statement of the Representative of *Nicaragua* to the UNGA, UNGA Meeting Record (14 September 2009), *ibid*.

<sup>1864</sup> Statement of the Representative of *Nicaragua* to the UNGA, *ibid*.

<sup>1865</sup> Statement of the Representative of *Nicaragua* to the UNGA, *ibid*.

<sup>1866</sup> On Sri Lanka, see generally UN Security Council Update Report, ‘Sri Lanka’ (4 June 2009), 6 <<http://www.securitycouncilreport.org/update-report/lookup-c-glKWLeMTIsG-b-5214273.php>> accessed 11 October 2011. On Myanmar, see European Parliament Resolution, ‘The Tragic Situation in Burma’ (n 1786), paras K and 5 and the Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898.

<sup>1867</sup> UNHRC Res S-15/1 (n 1786), para 2; UNHRC Res S-16/1 (n 1786), para 1 and UNHRC Res S-19/1, ‘The Deteriorating Situation of Human Rights in the Syrian Arab Republic, and the Recent Killings in El-Houleh’ (4 June 2012) UN Doc A/HRC/RES/S-19/1, para 5. (UNHRC Res S-19/1).

<sup>1868</sup> The UNSC “recalled” the ‘Libyan authorities’ responsibility to protect its population’. UNSC Res 1970 (2011) (n 1786), preambular para 9.

<sup>1869</sup> The UNSC “reiterated” ‘the Libyan authorities responsibility to protect its population’. UNSC Res 1973 (2011) (n 1786), preambular para 4.

<sup>1870</sup> The UNSC “recalled” the ‘Yemeni government’s primary responsibility to protect its population’. UNSC Res 2014 (21 October 2011) UN Doc S/RES/2014(2011), preambular para 14. (UNSC Res 2014).

<sup>1871</sup> With respect to the references to primary RtoP in relation to the situation in Libya, see UNSC, Verbatim Record (26 February 2011) UN Doc S/PV.6491; UNSC, Verbatim Record (17 March 2011) UN Doc S/PV.6498 and UN Press Release, ‘Human Rights Council Passes Resolution on Syria in Special Session’ (25 February 2011) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10768&LangID=E>> accessed 3 August 2012 and UN Press Release, ‘Human Rights Council Debates Situation of Human Rights in Libya’ <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10766&LangID=E>> accessed 3 August 2012. In relation to the references to primary RtoP in the context of the situation in Yemen, see UNSC,

silence could be legally significant because, as Elias<sup>1872</sup> explains, '[t]he "acquiescence" version of consent'<sup>1873</sup> to the formation of new customary international law 'comes into play'<sup>1874</sup> in such contexts. Essentially, there is a general understanding that the silence of States with respect to a practice which *warrants their objection* (e.g. the affirmation of national authorities owing primary RtoP) can be considered as States' *acquiescence* with the fact that the rule at issue is of a binding nature.<sup>1875</sup> Although silence may be for wider political reasons, it can be used as a presumption of the existence of States' acceptance of the formation of new customary international law.<sup>1876</sup> Silence can be used to rebut a State's argument that they did not consent to the formation of that new rule because there is the presumption that, if a State did *not* intend to consent to the development of the new rule, it *would* have objected.<sup>1877</sup> State silence with respect to explicit references to primary RtoP in the contexts of Libya, Syria and Yemen could therefore indicate that States acquiesced with the idea that primary RtoP imposes *an obligation* to protect populations from RtoP crimes.

The primary RtoP obligation of the Syrian national authorities was also explicitly recalled in both October 2011<sup>1878</sup> and February 2012<sup>1879</sup> draft UNSC Resolutions. Whilst the October draft UNSC Resolution recalls 'the Syrian government's primary responsibility to protect its population',<sup>1880</sup> the February draft UNSC Resolution '[d]emands that the Syrian government immediately [...] protects its population'.<sup>1881</sup> Both draft Resolutions were vetoed by Russia and China.<sup>1882</sup> Furthermore, Brazil, India, Lebanon and South Africa abstained from the vote on the adoption of the October 2011 draft UNSC Resolution.<sup>1883</sup> However, the reference to primary RtoP was not explicitly challenged by any of the aforementioned States,<sup>1884</sup> thereby suggesting they agreed that primary RtoP obligated the Syrian authorities to protect its population from RtoP crimes.

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UNSC Verbatim Record (21 October 2011) UN Doc S/PV.6634. With respect to the references to primary RtoP in the context of the situation in Syria, see UN Press Release, 'Human Rights Council Debates Situation of Human Rights in Syrian Arab Republic' (n 1786) and UN OHCHR, 'Human Rights Council Requests Commission of Inquiry to Conduct a Special Inquiry in the Events in El Houleh' (1 June 2012) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12215&LangID=E>> accessed 7 July 2012.

<sup>1872</sup> O Elias, 'The Relationship Between General and Particular Customary International Law' (1996) 8 Afr. J.

Int'l & Comp. L. 67.

<sup>1873</sup> Elias, *ibid.*, 87.

<sup>1874</sup> Elias, *ibid.*

<sup>1875</sup> Elias, *ibid.*

<sup>1876</sup> Elias, *ibid.*

<sup>1877</sup> Elias, *ibid.*

<sup>1878</sup> Draft UNSC Res (4 October 2011) UN Doc S/2011/612, preambular para 5. (Draft UNSC Resolution, 4 October 2011).

<sup>1879</sup> Draft UNSC Res (4 February 2012) UN Doc S/2012/77, para 2. (Draft UNSC Res, 4 February 2012).

<sup>1880</sup> Draft UNSC Resolution, 4 October 2011 (n 1878), preambular para 5.

<sup>1881</sup> Draft UNSC Res, 4 February 2012 (n 1879), para 2.

<sup>1882</sup> See the voting records in UNSC Verbatim Record (4 October 2011) UN Doc. S/PV.6627, 2 and UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711, 2.

<sup>1883</sup> See the voting record in UNSC Verbatim Record (4 October 2011), *ibid.*

<sup>1884</sup> Statement of the Representatives of the Russian Federation, China, Brazil Lebanon and South Africa to the UNSC, UNSC Verbatim Record (4 October 2011), *ibid.* and Statements of the Representatives of the Russian Federation and China to the UNSC, UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711.

The approach taken to primary RtoP in the case studies of Libya, Syria and Yemen could entail a broader legal significance. Notably, each of the abovementioned UNHRC and UNSC Resolutions separated references to primary RtoP from references to States existing human rights/humanitarian law obligations.<sup>1885</sup> As an example, the UNHRC Resolution on Libya ‘[s]trongly calls upon the Government of Libya to meet its responsibility to protect its population [...] and to fully respect all human rights and fundamental freedoms, including freedom of expression and freedom of assembly’.<sup>1886</sup> This distinction may be legally significant because it reinforces the suggestion that primary RtoP can create new interpretations of States’ existing human rights treaty duties by offering the prospect of different mechanisms to promote and ensure State compliance. To be more specific, primary RtoP can be distinguished from States existing human rights obligations by reason of the *consequences* which can arise in the event of its breach. That is, a manifest failure to fulfil primary RtoP effectively can activate the application of non-peaceful responsive measures under secondary RtoP.<sup>1887</sup>

## 2 The Legal Status of Secondary RtoP

### 2.1 The Creation Phase (2005)

Examination of State views given during the Outcome Document’s drafting<sup>1888</sup> and at its adoption<sup>1889</sup> illustrates that there was no intention to formulate secondary RtoP as new customary international law. However, New Zealand<sup>1890</sup> and Mexico<sup>1891</sup> argued that

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<sup>1885</sup> With respect to the Human Rights Council’s Resolutions, see for example (i) UNHRC Res S-15/1 (n 1786), para 2 which urges ‘the Government of Libya to meet its responsibility to protect its population’ *and* to ‘fully respect all human rights and fundamental freedoms, including freedom of expression and freedom of assembly’; (ii) UNHRC Res S-16/1 (n 1786), para 1 which calls for the Syrian government to ‘protect its population’ *and* ‘respect fully all human rights and fundamental freedoms, including freedom of expression and freedom of assembly’. For similar examples, see further UNHRC Res S-19/1 (n 1867), para 5. With respect to this distinction in the relevant UNSC Resolutions, see e.g. (i) UNSC Res 2014 (n 1870), preambular para 14 and para 5 which respectively recall ‘the Yemeni Government’s primary responsibility to protect its population’ *and* demand ‘that the Yemeni authorities immediately ensure their actions comply with obligations under applicable international humanitarian and human rights law’; (ii) UNSC Res 1970 (2011) (n 1786), preambular para 9 and para 2 (a) which respectively recall ‘the Libyan authorities’ responsibility to protect its population’ *and* urges the Libyan authorities to ‘respect human rights and international humanitarian law’; and (iii) UNSC Res 1973 (2011) (n 1786), preambular para 4 and para 3 which respectively reiterate ‘the responsibility of the Libyan authorities to protect the Libyan population’ *and* demand ‘that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law’.

<sup>1886</sup> UNHRC Res S-15/1, *ibid*, emphasis original.

<sup>1887</sup> Outcome Document (n 1772), para 139.

<sup>1888</sup> Statements delivered are detailed in Annex I (a) – (d).

<sup>1889</sup> Statements delivered are detailed in Annex I (e).

<sup>1890</sup> Statement of the Representative of *New Zealand* to the UNGA, ‘High-Level Meeting of the Plenary’ (28 July 2005), July 2005 State Views (n 1775).



secondary RtoP was an ‘emerging norm’<sup>1892</sup> and ‘evolving law’.<sup>1893</sup> Examination of these statements suggests that these States were referring to the way in which secondary RtoP could *strengthen emerging interpretations* of the treaty provisions to which it relates, not that it was in the process of becoming new customary international law. To this effect, both States<sup>1894</sup> noted that the UNSC’s discharge of secondary RtoP through Chapter VII enforcement measures was consistent with the growing recognition that events inside a State, such as the perpetration of RtoP crimes, can in themselves represent a threat to international peace and security. This approach affirms that these States consider secondary RtoP’s discharge through non-peaceful responsive measures, such as the use of armed force, should be pursuant to existing legal provisions, not least the requirement for UNSC authority under Article 42 of the UN Charter.<sup>1895</sup> Furthermore, it reminds the UNSC that Article 39<sup>1896</sup> has been interpreted in earlier practice to be activated by internal protection issues like RtoP crimes and, therefore, that the Outcome Document can be effective as *soft law*, specifically by formally acknowledging acceptability of this emerging practice. The US<sup>1897</sup> was cautious regarding the legal implications of this, arguing that:

‘[T]he Charter has *never* been interpreted as creating a *legal obligation* for UNSC members to *support enforcement action* in various cases involving serious breaches of international peace. Accordingly, we believe just as strongly that a determination as to what particular measures to adopt in specific cases cannot be predetermined in the abstract but should *remain a decision* within the *purview* of the UNSC’.<sup>1898</sup>

Essentially, the US appears to reject that secondary RtoP’s interplay with Article 39, and the UNSC’s particular role in discharging secondary RtoP, mean that secondary RtoP imposes a *new legal obligation to act* upon the UNSC. Furthermore, the US stated that ‘the Council may, and is fully empowered to, take action under the Charter, including enforcement action, if so required’,<sup>1899</sup> thereby affirming that Article 39 gives the UNSC discretion over whether to authorise enforcement measures in a specific case. However, the US noted that a key

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<sup>1891</sup> Statement of the Representative of *Mexico* to the UNGA, ‘High-Level Meeting of the Plenary’ (April 2005), April 2005 State Views (n 1775).

<sup>1892</sup> Statement of the Representative of *New Zealand* to the UNGA, ‘High-Level Meeting of the Plenary’ (28 July 2005), July 2005 State Views (n 1775).

<sup>1893</sup> Statement of the Representative of *Mexico* to the UNGA, ‘High-Level Meeting of the Plenary’ (April 2005), April 2005 State Views (n 1775).

<sup>1894</sup> Statement of the Representative of *Mexico* to the UNGA, *ibid* and Statement of the Representative of *New Zealand* to the UNGA, ‘High-Level Meeting of the Plenary’ (28 July 2005), July 2005 State Views (n 1775).

<sup>1895</sup> Article 42 provides: ‘Should the UNSC consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations’. United Nations, *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 42. (UN Charter).

<sup>1896</sup> UN Charter, *ibid*, art 39.

<sup>1897</sup> Letter of the US Ambassador, John Bolton (n 1793), 1.

<sup>1898</sup> Letter of the US Ambassador, John Bolton, *ibid*, emphasis added.

<sup>1899</sup> Letter of the US Ambassador, John Bolton, *ibid*.

outcome of the Summit was the formulation of ‘a moral obligation to help others and a moral duty to make sure our actions are effective’.<sup>1900</sup> Whilst the US does not expressly refer to secondary RtoP, the statement raises the possibility that the US may recognise secondary RtoP as a *new moral and/or political responsibility to protect populations* of the international community, including the UNSC.

Other States suggested that Article 27 (3) of the Charter should be reinterpreted in light of secondary RtoP.<sup>1901</sup> Whilst the UN Charter does not explicitly confer the P5 a veto power, Article 27 (3) provides that non-procedural matters of the UNSC, such as those taken under Chapter VII, require an affirmative vote of nine members and *a concurring vote of the P5*.<sup>1902</sup> Peru<sup>1903</sup> and Switzerland<sup>1904</sup> proposed that the P5 agree not to use the veto in cases involving RtoP crimes. Significantly, neither suggested that the UNSC were under any new legal obligation to refrain from using the veto in RtoP cases. Instead, Peru<sup>1905</sup> called upon the P5 to adopt a ‘gentleman’s agreement’<sup>1906</sup> on the issue. No member of the P5 expressly accepted or rejected this proposal. However, China,<sup>1907</sup> Russia<sup>1908</sup> and the US<sup>1909</sup> seemed to reject this at the Summit by urging that secondary RtoP must be discharged in accordance with the UN Charter which, presumably, includes the requirement for a concurring vote of the P5.

There was also some consideration over whether secondary RtoP had any legal effect upon the prohibition on the use of armed force under existing treaty and customary international law. No State suggested that unilateral or unauthorised armed force could be used to discharge secondary RtoP. Indeed, several States<sup>1910</sup> affirmed that armed force under secondary RtoP should be undertaken collectively with prior UNSC authority. This suggests no intention (i) to create secondary RtoP as new customary international law permitting the

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<sup>1900</sup> Statement of the Representative of the *United States* to the UNGA, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.2.

<sup>1901</sup> See particularly, Statement of the Representative of *Peru* to the UNGA, ‘High-Level Meeting of the Plenary’ (28 July 2005), July 2005 State Views (n 1775) and Statement of the Representative of *Switzerland* to the UNGA, ‘High-Level Meeting of the Plenary’ (April 2005), April 2005 State Views (n 1775).

<sup>1902</sup> UN Charter (n 1895) art 27 (3).

<sup>1903</sup> Statement of the Representative of *Peru* to the UNGA, ‘High-Level Meeting of the Plenary’ (28 July 2005), July 2005 State Views (n 1775).

<sup>1904</sup> Statement of the Representative of *Switzerland* to the UNGA, ‘High-Level Meeting of the Plenary’ (April 2005), April 2005 State Views (n 1775).

<sup>1905</sup> Statement of the Representative of *Peru* to the UNGA, ‘High-Level Meeting of the Plenary’ (28 July 2005), July 2005 State Views (n 1775).

<sup>1906</sup> Statement of the Representative of *Peru* to the UNGA, *ibid*.

<sup>1907</sup> Statement of the Representative of *China* to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005) June 2005 State Views (n 1775).

<sup>1908</sup> Statement of the Representative of the *Russian Federation* to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005), *ibid*.

<sup>1909</sup> Statement of the Representative of the *United States* to the UNGA, ‘High-Level Meeting of the Plenary’ (22 June 2005), *ibid*.

<sup>1910</sup> These include: Statements of the Representatives of *Canada, Chile, China, European Union, France and New Zealand* to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005); Statement of the Representative of the *United States* to the UNGA, ‘High-Level Meeting of the Plenary’ (22 June 2005); Statements of the Representatives of *Dominica (on behalf of CARICOM), Israel, Tanzania and Colombia* to the UNGA, ‘High-Level Meeting of the Plenary’ (30 June 2005), June 2005 State Views (n 1775); Statement of the Representative of *Australia* to the UNGA, ‘High-Level Meeting of the Plenary’ (28 July 2005), July 2005 State Views (n 1775).

use of unilateral or unauthorised armed force for human protection purposes or (ii) for the Charter prohibition to be reinterpreted as not extending to such in light of the subsequent State practice on secondary RtoP. Nonetheless, some States<sup>1911</sup> were concerned that secondary RtoP's adoption could entail these legal implications. States like Cuba,<sup>1912</sup> Algeria,<sup>1913</sup> Malaysia (on behalf of the Non-Aligned Movement)<sup>1914</sup> and Pakistan<sup>1915</sup> argued that secondary RtoP was a new name for humanitarian intervention and, therefore, a deviation from the existing legal prohibition on armed force. During early negotiations on the Outcome Document, Russia<sup>1916</sup> also argued that secondary RtoP undermined the UN Charter and international law. Arguably, Russia was also concerned that secondary RtoP could generate new customary international law or interpretation of the treaty prohibition on armed force, thereby undermining the principle of non-interference in internal affairs which it strongly defends. However, the Outcome Document was ultimately adopted by consensus, at least partly because the final text provided that collective action under secondary RtoP should be 'through the UNSC, *in accordance with the Charter*, including Chapter VII'.<sup>1917</sup> This provision overcomes the implication that secondary RtoP could, over time, *legalise* the unilateral or unauthorised use of armed force for human protection purposes and, rather, reinforces that the legal use of armed force must be collective with the UNSC's authorisation.

Following the Outcome Document's adoption, the UNSC began to consider affirming the Outcome Document's RtoP provisions in a Resolution regarding the protection of civilians

<sup>1911</sup> Statement of the Representative of *Cuba, Belarus, Qatar, Egypt, Côte d'Ivoire, Colombia, Bangladesh and Indonesia* to the UNGA, 'High-Level Meeting of the Plenary' (April 2005), April 2005 State Views (n 1775); Statements of the Representatives of *Cuba, Algeria, Pakistan, Russian Federation, Iran and Singapore* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005), June 2005 State Views (n 1775); Statement of the Representative of the *Democratic Republic of Korea* and *Brazil* to the UNGA, 'High-Level Meeting of the Plenary' (22 June 2005), June 2005 State Views (n 1775); Statements of the Representatives of *Viet Nam, Sri Lanka* and *Venezuela* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005), June 2005 State Views (n 1775); Statement of the Representative of *Argentina* to the UNGA, 'High-Level Meeting of the Plenary' (July 2005), July 2005 State Views (n 1775); Statements of the Representatives of *Cuba, Algeria, Syria* and *Mauritania (on behalf of the African Group)* to the UNGA, 'High-Level Meeting of the Plenary' (August 2005), WFM Report (n 1775); Statement of the Representative of *Malaysia (on behalf of the Non-Aligned Movement)* to the UNGA, 'High-Level Meeting of the Plenary' (1 August 2005), August 2005 State Views (n 1775); Statement of the Representative of *Zimbabwe* to the UNGA, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.4 and Statement of the Representative of *Cuba* to the UNGA, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.81.

<sup>1912</sup> Statement of the Representative of *Cuba* to the UNGA, 'High-Level Meeting of the Plenary' (April 2005), April 2005 State Views (n 1775); Statement of the Representative of *Cuba* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005), June 2005 State Views (n 1775); Statement of the Representative of *Cuba* to the UNGA, 'High-Level Meeting of the Plenary' (August 2005), WFM Report (n 1775) and Statement of the Representative of *Cuba* to the UNGA, UNGA Meeting Record (16 September 2005), *ibid*.

<sup>1913</sup> Statement of the Representative of *Algeria* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005), June 2005 State Views (n 1775) and Statement of the Representative of *Algeria* to the UNGA, 'High-Level Meeting of the Plenary' (August 2005), WFM Report (n 1775).

<sup>1914</sup> Statement of the Representative of *Malaysia (on behalf of the Non-Aligned Movement)* to the UNGA, 'High-Level Meeting of the Plenary' (1 August 2005), August 2005 State Views (n 1775).

<sup>1915</sup> Statement of the Representative of *Pakistan* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005), June 2005 State Views (n 1775).

<sup>1916</sup> Statement of the Representative of the *Russian Federation* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005), *ibid*.

<sup>1917</sup> Outcome Document (n 1772), para 139.

in armed conflict. However, it was difficult to reach consensus on this Resolution and examination of the drafting history suggests that this was partly due to legal reasons. The original draft proposed including two express references to RtoP<sup>1918</sup> but neither incorporated the qualified phrases used in the Outcome Document. Instead, the proposed references (i) referred to ‘the responsibilities of individual Member States as well as the international community’<sup>1919</sup> to take protective action; and (ii) specified that the international community could act ‘through the United Nations, including the UNSC’,<sup>1920</sup> as opposed to the Outcome Document requirement for such action be taken ‘*through* the UNSC’.<sup>1921</sup> These provisions implied that secondary RtoP could be implemented unilaterally (i.e. ‘the responsibilities of individual’<sup>1922</sup> States) and that there may be a source of authority for collective action other than the UNSC. On the one hand, these could be pursuant to other existing obligations. As Liechtenstein<sup>1923</sup> has highlighted, secondary RtoP interconnects with States individual treaty obligations such as the obligation to call upon the United Nations to take appropriate action to prevent genocide.<sup>1924</sup> Furthermore, the idea of there being a source of authority for collective action other than the UNSC tends to reinstate the Charter provision that the UNGA has a residual obligation to maintain peace and security<sup>1925</sup> and capacity to recommend collective measures short of the use of armed force when there is a threat to this.<sup>1926</sup> The fact that the provisions left open the possibility of unilateral action could have undermined the compromise reached at the Summit with respect to secondary RtoP creating no new legal basis for the use of unilateral or unauthorised armed force for human protection purposes. It is therefore unsurprising that no State suggested that secondary RtoP formulated any new legal obligations. However, some States<sup>1927</sup> raised the possibility of reinterpreting

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<sup>1918</sup> The first proposed reference read as follows: ‘[r]ecalling the 2005 World Summit Outcome Document, including its provisions regarding the responsibility to protect populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and in this regard the responsibilities of individual Member States as well as the international community, acting through the United Nations, including the UNSC’. The second proposed reference was worded in essentially the same way. The only notable difference was that this reference ‘underlines the importance’ of the Outcome Document’s RtoP paragraphs. Proposed Draft UNSC Res, ‘Protection of Civilians in Armed Conflict’ (21 November 2005), preambular para 4 and para 7 <<http://www.responsibilitytoprotect.org/index.php/document-archive/united-nations?view=fjrelated&id=2410>> accessed 10 January 2012. (Proposed Draft UNSC Res, 21 November 2005).

<sup>1919</sup> Proposed Draft UNSC Res, *ibid*.

<sup>1920</sup> Proposed Draft UNSC Res, *ibid*.

<sup>1921</sup> Outcome Document (n 1772), para 139, emphasis added.

<sup>1922</sup> Proposed Draft UNSC Res, 21 November 2005 (n 1918), preambular para 4 and para 7.

<sup>1923</sup> Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1).

<sup>1924</sup> Convention on the Prevention and Punishment of the Crime of Genocide 1948 (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art 8. (Genocide Convention).

<sup>1925</sup> UN Charter (n 1895), art 11 (2).

<sup>1926</sup> UNGA Res 377 (V), ‘Uniting for Peace Resolution’ (3 November 1950) UN Doc A/RES/377(V). On this see M O’Connell, ‘Responsibility to Peace: A Critique of RtoP’ in P Cunliffe (ed), *Critical Perspectives on the Responsibility to Protect* (Routledge, Abingdon 2011) 75-77.

<sup>1927</sup> This includes: Statement of the Representative of *Norway* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209; Statements of the Representatives of *Peru* and *Canada* (on behalf of *Australia* and *New Zealand*) to the UNSC, ‘Protection of Civilians in Armed Conflict’ (9 December 2005) UN Doc S/PV.5319;

existing treaty obligations in light of secondary RtoP, including whether the UNSC's obligation to maintain peace and security could be reinterpreted as entailing a parallel obligation to protect populations. In terms of the P5, the UK<sup>1928</sup> and France<sup>1929</sup> took similar positions. Whilst neither State endorsed nor rejected the argument that the UNSC owes an obligation to protect populations from RtoP crimes, both defended the UNSC's role in the protection of populations. France stressed that the Outcome Document represents a 'major political and philosophical progress'<sup>1930</sup> which can 'guide the work'<sup>1931</sup> of the UNSC in the 'protection of populations'.<sup>1932</sup> Similarly, the UK<sup>1933</sup> called for a consensus understanding of the UNSC's role in these areas in order to strengthen and develop its humanitarian work. Both States therefore alluded to human protection being an acceptable *objective* of the UNSC's fulfilment of their Charter obligation to maintain peace and security. This was not supported by China<sup>1934</sup> and Russia.<sup>1935</sup> Both argued that the UNSC should not subsume the UNGA's role in the development of secondary RtoP. This suggests, albeit implicitly, that China and Russia reject reinterpreting the UNSC's Charter obligation under secondary RtoP. One policy consideration which could underscore Russia and China's position is that the reinterpretation could require the UNSC to adopt a proactive protection role and, therefore, increased intervention in a State's internal affairs. Egypt<sup>1936</sup> and Colombia<sup>1937</sup> alluded to this. Egypt rejected reinterpreting the UNSC's peace and security obligation in protection terms. It argued that these are broader thematic issues which fall within the mandate of the UNGA and that the UNSC had no mandate to conduct legislative activities in this area.<sup>1938</sup> Colombia<sup>1939</sup> argued that the UNSC's involvement in wider 'thematic issues',<sup>1940</sup> such as the general protection of civilians in armed conflict, exceeds the 'area of competence assigned to'<sup>1941</sup> it by the UN Charter. This suggests that Egypt<sup>1942</sup> and Colombia<sup>1943</sup> may have been

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Statements of the Representatives of *Liechtenstein* and *Rwanda* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1).

<sup>1928</sup> Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1).

<sup>1929</sup> Statement of the Representative of *France* to the UNSC, *ibid.*

<sup>1930</sup> Statement of the Representative of *France* to the UNSC, *ibid.*

<sup>1931</sup> Statement of the Representative of *France* to the UNSC, *ibid.*

<sup>1932</sup> Statement of the Representative of *France* to the UNSC, *ibid.*

<sup>1933</sup> Statement of the Representative of the *United Kingdom* to the UNSC, *ibid.*

<sup>1934</sup> Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319.

<sup>1935</sup> Statement of the Representative of the *Russian Federation* to the UNSC, *ibid.*

<sup>1936</sup> Statement of the Representative of *Egypt* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1).

<sup>1937</sup> Statement of the Representative of *Colombia* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209.

<sup>1938</sup> Statement of the Representative of *Egypt* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1).

<sup>1939</sup> Statement of the Representative of *Colombia* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209.

<sup>1940</sup> Statement of the Representative of *Colombia* to the UNSC, *ibid.*

<sup>1941</sup> Statement of the Representative of *Colombia* to the UNSC, *ibid.*

apprehensive regarding the capacity of the UNSC to formulate general policies regarding the protection of populations when a situation does not constitute a threat to international peace and security.

Further consideration was also given to reinterpreting the UNSC's veto power in light of secondary RtoP. States like Liechtenstein<sup>1944</sup>, Rwanda<sup>1945</sup> and Peru<sup>1946</sup> all called for the UNSC to *agree to* refrain from using its veto power in RtoP cases, not that secondary RtoP imposed a new legal obligation on the P5 not to use the veto. Again, members of the P5 reacted differently to the proposal. The UK,<sup>1947</sup> US<sup>1948</sup> and France<sup>1949</sup> remained silent on the issue, strengthening the possibility that they could *acquiesce* with a reinterpretation of Article 27 (3) in RtoP cases. Russia<sup>1950</sup> and China<sup>1951</sup> were also silent. However, the preceding section noted these States have argued that secondary RtoP must be discharged in full accordance with the UN Charter. Presumably, this would include secondary RtoP's implementation conforming to Article 27 (3) because such cases would engage the UNSC in "non-procedural matter(s)" and, therefore, be subject to existing legal requirement for a concurring vote of the P5.

## 2.2 The Refinement Phase (2006-2008)

Between 2006 and 2008 the legal significance and content of secondary RtoP was refined. UNSC Resolution 1706 (2006)<sup>1952</sup> authorised the deployment of peacekeepers to Darfur and become the first country-specific UNSC Resolution to explicitly affirm the Outcome Document's RtoP provisions, including those on secondary RtoP.<sup>1953</sup> Whilst Sudan failed to give effect to this authorisation, it is nevertheless legally significant because it suggests a growing consensus that secondary RtoP *could be implemented* in practice. No State

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<sup>1942</sup> Statement of the Representative of *Egypt* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1).

<sup>1943</sup> Statement of the Representative of *Colombia* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209.

<sup>1944</sup> Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1).

<sup>1945</sup> Statement of the Representative of *Rwanda* to the UNSC, UNSC Verbatim Record, *ibid*.

<sup>1946</sup> Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319.

<sup>1947</sup> Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1).

<sup>1948</sup> Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record, *ibid*.

<sup>1949</sup> Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record, *ibid*.

<sup>1950</sup> Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319.

<sup>1951</sup> Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record, *ibid*.

<sup>1952</sup> UNSC Res 1706 (n 1786).

<sup>1953</sup> UNSC Res 1706, *ibid*, preambular para 2. [*'Recalling also its previous resolutions 1325 (2000) on women, peace and security, 1502 (2003) on the protection of humanitarian and United Nations personnel, 1612 (2005) on children and armed conflict, and 1674 (2006) on the protection of civilians in armed conflict, which reaffirms inter alia the provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit Outcome Document', emphasis original*].

suggested that secondary RtoP legally obligates the UNSC to protect populations through, for example, the deployment of peacekeepers. However, some States<sup>1954</sup> appeared to support reinterpreting the UNSC's obligation to maintain peace and security in light of secondary RtoP, specifically as that entailing a parallel, discretionary, moral obligation to protect populations through the measures available to the UNSC under the UN Charter. The US<sup>1955</sup> stressed the need for the UNSC to act quickly in order to address the alleged genocide taking place in Darfur. This could suggest that the US position on the issue of whether secondary RtoP affects the UNSC's discretion under Article 39 is *evolving*, specifically toward recognising that the UNSC should interpret this discretion in light of a moral or political obligation of the international community to protect populations from RtoP crimes. Slovakia<sup>1956</sup> and Greece<sup>1957</sup> are useful illustrations of the standpoint taken by States without a permanent seat on the UNSC. Greece argued that 'when the Council is faced *with a humanitarian crisis* it has *a moral duty to act* expeditiously to stop human suffering'.<sup>1958</sup> Slovakia<sup>1959</sup> made a similar argument, stating that 'the UN Security Council has *the moral duty and responsibility to act* without delay to prevent an escalation of the crisis'.<sup>1960</sup> The italicised terms suggests that these States could support reinterpreting the UNSC's Charter obligation to include a parallel moral obligation to protect populations.

In 2006 the UNSC also unanimously adopted Resolution 1674,<sup>1961</sup> affirming the Outcome Document RtoP provisions in the specific context of the Protection of Civilians in Armed Conflict.<sup>1962</sup> Prima facie, its unanimous adoption could be legally significant<sup>1963</sup> by suggesting a growing willingness to discharge secondary RtoP in practice. However, State views do not

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<sup>1954</sup> See the statements of the following representatives: *Argentina, Congo, Denmark, France, Ghana, Greece, Japan, Peru, Slovakia, United Kingdom, United Republic of Tanzania, United States* to the UNSC, UNSC Verbatim Record (31 August 2006) UN Doc S/PV.5519.

<sup>1955</sup> Statement of the Representative of the *United States* to the UNSC, *ibid*.

<sup>1956</sup> Statement of the Representative of *Slovakia* to the UNSC, *ibid*.

<sup>1957</sup> Statement of the Representative of *Greece* to the UNSC, *ibid*.

<sup>1958</sup> Statement of the Representative of *Greece* to the UNSC, *ibid*.

<sup>1959</sup> Statement of the Representative of *Slovakia* to the UNSC, *ibid*.

<sup>1960</sup> Statement of the Representative of *Slovakia* to the UNSC, *ibid*.

<sup>1961</sup> UNSC Res 1674 (n 1786).

<sup>1962</sup> It reaffirmed 'the provisions of paragraphs 138 and 139 of the 2005 WSOD regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. UNSC Draft Res (27 April 2006) UN Doc S/2006/267, preambular para 4.

<sup>1963</sup> Thirlway, "The Sources of International Law" (n 1777), 124. This requirement emanates from the following dicta of the ICJ in the *Nicaragua* case: 'It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. *The Court does not consider that, for a rule to be established as customary, the corresponding practice, must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of recognition of a new rule.* If a State acts in a way which is inconsistent with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule', emphasis added. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits, Judgment*, ICJ Reports 1986, p 14, para 186.

support this interpretation. China<sup>1964</sup> argued that secondary RtoP could not be practically implemented until it had been discussed by the UNGA. In contrast, other States<sup>1965</sup> focused on the way in which secondary RtoP *could be* practically implemented by affirming the Outcome Document provisions regarding its implementation through assistance, peaceful and non-peaceful means.

There was also a legal dimension to State views. First, further support emerged for existing treaty obligations being reinterpreted in light of secondary RtoP. States like Slovakia,<sup>1966</sup> Slovenia,<sup>1967</sup> Liechtenstein<sup>1968</sup> and Belgium<sup>1969</sup> all called for the UNSC to refrain from using the veto in RtoP cases, suggesting support for reinterpreting Article 27 (3) in light of secondary RtoP. In addition, Ghana<sup>1970</sup> added its support for reinterpreting the UNSC's peace and security obligation as that which entailed a parallel, moral obligation to protect populations. Ghana argued that the UNSC owe a moral 'humanitarian duty'<sup>1971</sup> to protect populations from RtoP crimes. This tends to shift from seeing the UNSC's obligations within the strict confines of international peace and security and, instead, turn toward recognising the UNSC to owe at least a moral or political obligation to protect populations from RtoP crimes. The P5 remained relatively silent regarding both of these proposals. However, Russia began to adopt a somewhat different approach to secondary RtoP and, accordingly, its position could be said to have evolved during this phase.

During the Outcome Document's drafting, Russia argued that secondary RtoP's implementation should be pursuant to the UN Charter<sup>1972</sup> and following the UNGA's consideration of RtoP.<sup>1973</sup> However, in 2007 Russia<sup>1974</sup> outlined that the UNSC's role under secondary RtoP is to *support* States own efforts to protect the population. On the one hand, this challenges the contention that the UNSC owes an obligation, moral or otherwise, to protect populations when national authorities fail to do so. This could show a growing

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<sup>1964</sup> Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476.

<sup>1965</sup> See e.g.: Statements of the Representatives of *Slovakia*, *Ghana* and *Japan* to the UNSC, UNSC Verbatim Record (4 December 2006) UN Doc S/PV.5577; Statements of the Representatives of *Tanzania*, *Congo*, *Argentina* and *Austria (on behalf of the European Union)* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476.

<sup>1966</sup> Statement of the Representative of *Slovakia* to the UNSC, *ibid.*

<sup>1967</sup> Statement of the Representative of *Slovenia (on behalf of the Human Security Network)* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476.

<sup>1968</sup> Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record, *ibid.*

<sup>1969</sup> Statement of the Representative of *Belgium* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781.

<sup>1970</sup> Statement of the Representative of *Ghana* to the UNSC, UNSC Verbatim Record (4 December 2006) UN Doc S/PV.5577.

<sup>1971</sup> Statement of the Representative of *Ghana* to the UNSC, *ibid.*

<sup>1972</sup> Statement of the Representative of the *Russian Federation* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005), June 2005 State Views (n 1775).

<sup>1973</sup> Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319.

<sup>1974</sup> Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 and Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703.



sensitivity to the way in which the Outcome Document's secondary RtoP provisions could, as an instrument of soft law, lead modification in the interpretations given to fundamental principles of the UN Charter. This includes principles which Russia is eager to uphold (i) *because of* its national interests (e.g. respect for State sovereignty, territorial integrity and non-intervention); and (ii) those which enable it *to defend* its national interests in the UNSC (e.g. the veto power). Conversely, it could illustrate the way in which States positions on secondary RtoP can be influenced by their own political interests. Arguably, Russia's national political interests at this time may have influenced why its position evolved toward endorsement of secondary RtoP, including its capacity to be practically implemented. Notably, Russia's evolving position on secondary RtoP (i) coincided with the way in which its interests in the South Ossetian region were being increasingly threatened by Georgia's international development and ambitions (e.g. NATO membership);<sup>1975</sup> and (ii) preceded Russia's use of unilateral and unauthorised armed force against Georgia. These issues raise questions regarding the legal significance of Russia's invocation of RtoP to justify its armed force against Georgia.<sup>1976</sup>

As the ICJ has observed, the significant aspect of State practice involving deviations from the prohibition on armed force is the legal justification which a State offers, irrespective of whether the State may have been influenced by political considerations.<sup>1977</sup> The Court advised that the reason for this is because '[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law'.<sup>1978</sup> Prima facie, Russia's violation of the prohibition on armed force and reference to RtoP suggests that it considers the Outcome Document to create either (i) new customary international law permitting unilateral or unauthorised armed force for human protection purposes; or (ii) a new interpretation to the Charter prohibition on armed force. However, no State endorsed the deviation from the legal regime on armed force under existing treaty and customary international law. Instead, a recurrent theme in State<sup>1979</sup> approaches to Russia's actions was the denunciation of the use of force for contravening Georgia's *sovereignty and territorial integrity*. This reinforces the

<sup>1975</sup> On Russia's interests in the area, see C Borgen, 'Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's "Frozen Conflicts"' (2007) 9 Or. Rev Int'l L. 477 and N Cutts, 'Enemies through the Gates: Russia's Violations of International Law in the Georgia/Abkhazia Conflict' (2007-2009) 40 Case W. Res. J. Int'l L. 281.

<sup>1976</sup> "Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC" (*Ministry of Foreign Affairs of the Russian Federation*, Moscow, 9 August 2008) <[www.in.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcb3/f87a3fb7a7f669ebc32574a100262597?OpenDocument](http://www.in.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcb3/f87a3fb7a7f669ebc32574a100262597?OpenDocument)> accessed 11 May 2012 and Statement of the Russian Federation to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc S.PV.5952.

<sup>1977</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, para 207.

<sup>1978</sup> *Military and Paramilitary Activities in and against Nicaragua*, *ibid*.

<sup>1979</sup> See particularly: Statements of the Representatives of Belgium, United States and the United Kingdom to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5952.

treaty and customary international law prohibition on armed force, specifically that force should not be used against the 'sovereignty and territorial integrity of a State'.<sup>1980</sup> It suggests that States rejected the argument that the prohibition on armed force does not extend to the unilateral and unauthorised armed force for human protection purposes. Perhaps most significantly, Russia has not claimed that the Outcome Document alters the existing legal regime on armed force in any of its other statements on RtoP but, instead, has argued that RtoP's implementation should be in full accordance with the UN Charter.<sup>1981</sup> Consequently, this writer would argue that we should consider Russia's actions in this case to be politically motivated and that which have no impact upon the existing legal regime on armed force.

The idea that secondary RtoP subsumes existing legal obligations, rather than creating them anew, was also noted by Trinidad and Tobago<sup>1982</sup> during this phase. It urged 'the international community to exercise its responsibility to protect'<sup>1983</sup> in Darfur, arguing that it had a '*fundamental legal and moral obligation to act in cases such as this*'.<sup>1984</sup> This writer would suggest reference to the international community owing a legal obligation does not represent evidence of *opinio juris* on the part of this State. Rather, it alludes to the fact that secondary RtoP subsumes a number of obligations under existing treaty and customary international law and, therefore, that the international community owe a legal obligation to the extent that secondary RtoP has placed these legal obligations *into a new political and moral framework*.

### 2.3 The Continued Refinement and Moves toward Implementation Phase (2009 onward)

In 2009 there was a clear shift toward strengthening State acceptance that secondary RtoP could be institutionalised and implemented in practice. In terms of institutionalisation within the UN, the UNSG<sup>1985</sup> (i) recommended the appointment of a Special Adviser on RtoP (at the

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<sup>1980</sup> The UN Charter prohibition on armed force provides that: 'All Members shall refrain in their international relations from the threat or use of force *against the territorial integrity or political independence of any State*, or in any other manner inconsistent with the Purposes of the United Nations'. UN Charter (n 1895) art 2 (4), emphasis added.

<sup>1981</sup> Statement of the Representative of the *Russian Federation* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005), June 2005 State Views (n 1775).

<sup>1982</sup> See particularly the Statement of the Representative of *Trinidad and Tobago*, 'Opening of the Sixty First Session of the UN General Assembly' (September 2006) <<http://www.un.org/webcast/ga/61/index.shtml>> accessed 14 October 2011.

<sup>1983</sup> Statement of the Representative of *Trinidad and Tobago*, *ibid*.

<sup>1984</sup> Statement of the Representative of *Trinidad and Tobago*, *ibid*.

<sup>1985</sup> Report of the UNSG, 'Proposed Programme Budget for the Biennium 2008-2009: Estimates in Respect of Special Political Missions, Good Offices and Other Political Initiatives Authorised by the General Assembly and/or the UNSC' (30 October 2007) UN Doc A/62/512/Add.1, para 31 (UNSG Report, 'Proposed Programme Budget for the Biennium 2008-2009'); Letter of the UNSG to the President of the UNSC (31 August 2007) UN Doc S/2007/271. (Letter of the UNSG to UNSC President, 31 August 2007).

level of Assistant UNSG);<sup>1986</sup> (ii) organised for the UNGA to hold annual thematic debates on RtoP (particularly its secondary elements); and (iii) proposed appointing additional staff to act in conjunction with his Special Advisers on RtoP and the prevention of genocide as part of a Joint Office on Early Warning for RtoP-type crimes.<sup>1987</sup> Some States<sup>1988</sup> rejected moves toward institutionalisation. It was argued that secondary RtoP was not accepted as a fully established principle at the Summit<sup>1989</sup> and, therefore, the appointment of a “Special Adviser on the Responsibility to Protect” was altered to the appointment of a “Special Adviser” with a *focus* on RtoP.<sup>1990</sup> Furthermore, one group of States<sup>1991</sup> rejected secondary RtoP’s implementation in practice on the basis that the Outcome Document provided for the UNGA to *continue considering* RtoP.<sup>1992</sup> The majority of States refuted this, suggesting that they considered the provision to simply require that UNGA debates be held to enable deeper discussion of the Outcome Document’s ambiguous aspects.<sup>1993</sup> The provision may therefore

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<sup>1986</sup> UNSG Report, ‘Proposed Programme Budget for the Biennium 2008-2009 and Letter of the UNSG to UNSC President, 31 August 2007, *ibid.*

<sup>1987</sup> For details of this recommendation see Report of the UNSG, ‘Early Warning, Assessment and the Responsibility to Protect’ (14 July 2010) UN Doc A/64/864, 6-8.

<sup>1988</sup> Examples include: Statements of the Representatives of *Iran, Venezuela, Nicaragua* and *Ecuador* to the UNGA, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105; Statement of the Representative of *Iran* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statement of the Representative of *Sudan* to the UNSC, UNSC Verbatim Record (11 November 2009) UN Doc S/PV.6216(Res.1); Statement of the Representative of *Sudan* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1); Statement of the Representative of *Sudan* to the UNSC, UNSC Verbatim Record (22 November 2010) UN Doc S/PV.6427(Res.1) and Statement of *Cuba* to the UNGA Fifth Committee (3 March 2008) in UN Press Release, ‘United Nations Human Resources Structures must be adapted to meet Growing Demands of Peacekeeping, Other Field Operations, Budget Committee Told’ (4 March 2008) UN Doc GA/AB/3837 <<http://www.un.org/News/Press/docs/2008/gaab3837.doc.htm>> accessed 2 November 2011. (UN Press Release, ‘United Nations Human Resources Structures must be adapted to meet Growing Demands of Peacekeeping, Other Field Operations, Budget Committee Told’).

<sup>1989</sup> e.g. Statements of the Representatives of *Cuba, Egypt, Pakistan* and *Sudan* to the UNGA Fifth Committee in UN Press Release, ‘United Nations Human Resources Structures must be adapted to meet Growing Demands of Peacekeeping, Other Field Operations, Budget Committee Told’, *ibid.*

<sup>1990</sup> UN Press Release, ‘Secretary-General Appoints Edward C. Luck of United States as Special Advisor’ (21 February 2008) UN Doc SG/A/1120. On this adaptation of the mandate, see M Payandeh, ‘With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking’ (2010) 35 *Yale Journal of Int’l L.* 469, 477.

<sup>1991</sup> *Venezuela* is a good example. In argued that: ‘Some countries have groundlessly tried to affirm that this concept is a norm that can be implemented without the required discussions, but we believe that the General Assembly must discuss this concept and provide it with a consensus interpretation’. Statement of the Representative of *Venezuela* to the UNSC, UNSC Verbatim Record (26 June 2009) UN Doc S/PV.6151 (Res.1). Other examples include: Statements of the Representatives of *Iran, Venezuela, Ecuador* and *Nicaragua* to the UNGA, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105; Statement of the Representative of *Iran* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100; Statement of the Representative of *Sudan* to the UNSC, UNSC Verbatim Record (11 November 2009) UN Doc S/PV.6216(Res.1); Statement of the Representative of *Sudan* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1); Statement of the Representative of *Sudan* to the UNSC, UNSC Verbatim Record (22 November 2010) UN Doc S/PV.6427(Res.1) and Statement of the Representative of *Cuba* to the UNGA Fifth Committee in UN Press Release, ‘United Nations Human Resources Structures must be adapted to meet Growing Demands of Peacekeeping, Other Field Operations, Budget Committee Told’ (n 1988).

<sup>1992</sup> Outcome Document (n 1772), para 139.

<sup>1993</sup> Further support for this could be said to come from the approach of relevant international actors. It should be noted that the Chef de Cabinet to the Secretary-General argued that the RtoP framework was accepted at the Summit but, admittedly, ‘did not have widely shared consensus, yet’. Statement of the *Chef de Cabinet to the Secretary-General* to the UNGA Fifth Committee in UN Press Release, ‘United Nations Human Resources Structures must be adapted to meet Growing Demands of Peacekeeping, Other Field Operations, Budget Committee Told’ (n 1988).

be more focused upon ensuring continued discussion of secondary RtoP, rather than that which entails legal significance by preventing its practical implementation.

State views during this phase helped to clarify the way in which States interpret secondary RtoP's legal status. No State suggested that secondary RtoP imposes new legal obligations upon the international community, thereby undermining any evidence of *opinio juris* with regard to it becoming new customary international law. Rather, some States<sup>1994</sup> suggested that secondary RtoP repackages States existing legal obligations into a new, political framework. For instance, Switzerland<sup>1995</sup> argued that secondary RtoP was an important step in 'political mobilisation'<sup>1996</sup> but, whilst RtoP 'covers numerous existing international law obligations, it remains a political concept and does not in itself constitute a new norm'.<sup>1997</sup> Finland<sup>1998</sup> is a further illustration, stating that RtoP 'is a programmatic, rather than a clearly legal concept. From the legal point of view, it is a question of already existing mandates and responsibilities'.<sup>1999</sup> Essentially, these views highlight that *elements* of RtoP can have legal status because they subsume existing legal obligations and, furthermore, that the Outcome Document can be an effective instrument of soft law by encouraging compliance with these *existing* legal obligations.

Wider steps over this period and responses to country-specific situations, such as Syria, helped to further refine secondary RtoP's legal status. First, there was further clarification over whether the UNSC's veto power should be reinterpreted in light of secondary RtoP. More States, like Timor-Leste<sup>2000</sup>, supported the call for the non-use of the veto in RtoP cases. Furthermore, Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland proposed a draft UNGA Resolution regarding the UNSC's accountability and transparency. The Resolution proposed that the P5 refrain from 'using a veto to block Council action aimed at preventing genocide, war crimes and crimes against humanity'.<sup>2001</sup> However, Switzerland withdrew the draft Resolution in the course of the UNGA meeting because discussions on the draft revealed that, although States supported 'improving the Council's working

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<sup>1994</sup> See particularly, Statements of the Representatives of *Switzerland, Israel, Ghana, Algeria* and *Chile* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98; Statement of the Representatives of the *Netherlands* and *Sweden (on behalf of the European Union)* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97; Statements of the Representatives of *Timor-Leste* and *Kazakhstan* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

<sup>1995</sup> Statement of the Representative of *Switzerland* to the UNGA, *ibid.*

<sup>1996</sup> Statement of the Representative of *Switzerland* to the UNGA, *ibid.*

<sup>1997</sup> Statement of the Representative of *Switzerland* to the UNGA, *ibid.*

<sup>1998</sup> Speech of the *President of the Republic of Finland* at the High-Level Forum on the Responsibility to Protect (28 August 2009) <<http://www.responsibilitytoprotect.org/index.php/component/content/article/133-europe/2526-finland-high-level-forum-on-rtop-explores-how-to-take-the-norm-forward>> accessed: 10 October 2011.

<sup>1999</sup> Speech of the *President of the Republic of Finland*, *ibid.*

<sup>2000</sup> Statement of the Representative of *Timor-Leste* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

<sup>2001</sup> Draft UNGA Res, 'Improving the Working Methods of the UNSC' (28 March 2012) UN Doc A/66/L.42, para 20.

methods, they were not ready to act<sup>2002</sup> on the issue. Perhaps most significantly, during this phase Russia<sup>2003</sup> and China<sup>2004</sup> used their veto to block the adoption of three draft UNSC Resolutions on Syria.<sup>2005</sup> This suggests that neither Russia nor China accept reinterpreting the veto power in light of secondary RtoP, specifically as a power not to be used when RtoP crimes are being perpetrated against a population. However, there is wider legal and political significance to these developments. To this effect, the proposal for the P5 to read the veto power in light of secondary RtoP tends to reiterate that, in absence of the adoption of a “gentleman’s agreement”<sup>2006</sup> on the matter, the UNSC’s role in RtoP cases will be regulated by Article 27 (3) of the UN Charter. Furthermore, State responses to the vetoes in Syria point to further treaty obligations which secondary RtoP subsumes and, therefore, additional legally binding elements of it. States like France<sup>2007</sup> and the US<sup>2008</sup> both reminded the UNSC that Russia and China’s vetoes would not prevent them from taking further action in the UNSC or through others, such as relevant regional organisations. Indeed, the first, second and third double vetoes were directly proceeded by the adoption of UNGA Resolutions<sup>2009</sup>

<sup>2002</sup> UN Press Release, ‘Switzerland Withdraws Draft Resolution in General Assembly Aimed at Improving UNSC’s Working Methods to Avoid ‘Politically Complex’ Wrangling’ (16 May 2012) UN Doc GA/11234 <<http://www.un.org/News/Press/docs/2012/ga11234.doc.htm>> accessed 7 August 2012.

<sup>2003</sup> Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627; Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711 and Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810.

<sup>2004</sup> Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (4 October 2011), *ibid*; Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (4 February 2012), *ibid* and Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (19 July 2012), *ibid*.

<sup>2005</sup> Draft UNSC Resolution, 4 October 2011 (n 1878); Draft UNSC Res, 4 February 2012 (n 1879) and Draft UNSC Res (19 July 2012) UN Doc S/2012/538.

<sup>2006</sup> Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319.

<sup>2007</sup> Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627 [‘Let there be no mistake. This veto *will not stop us*’, emphasis added]; Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711 [‘We weathered a first double veto and returned to the Council; today, we have weathered a second on the part of the same countries. However, for the sake of the principles that guide the Council and the work of the United Nations’] and Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810 [‘I will say again what I said on 4 February: no, once again, *the double veto will not stop us* [...] This double veto *leaves the UNSC helpless* against the violence of the Syrian regime, *but France will not leave the Syrian people to face the crimes to which they are victim alone*’, emphasis and ellipsis added].

<sup>2008</sup> Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (4 October 2011), *ibid* [‘In failing to adopt the draft resolution before us, the Council *has squandered* an opportunity to *shoulder its responsibilities to the Syrian people*. We deeply regret that some members of the Council have prevented us from taking a principled stand against the Syrian regime’s brutal oppression of its people. But the suffering citizens of Syria are watching today, and so is the entire Middle East. The crisis in Syria *will stay before the UNSC, and we will not rest until the Council rises to meet its responsibilities*’, emphasis added] and Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (19 July 2012), *ibid* [‘The United States *has not and will not pin its policy* on an unarmed observer mission that is deployed in the midst of such widespread violence and that cannot even count on the *most minimal support* of the UNSC. Instead, we *will intensify our work* with a diverse range of partners outside the UNSC to bring pressure to bear on the Al-Assad regime and to deliver assistance to those in need’, emphasis added.]

<sup>2009</sup> See respectively, UN Press Release, ‘Third Committee Approves Resolution Condemning Human Rights Violations in Syria’ (22 November 2011) UN Doc GA/SHC/4033 <<http://www.un.org/News/Press/docs/2011/gashc4033.doc.htm>> accessed 7 August 2012 (UN Press Release, ‘Third Committee Approves Resolution Condemning Human Rights Violations in Syria’) and UNGA Third Committee Voting Record, ‘Situation of Human Rights in the Syrian Arab Republic’ (22 November 2011) UN Doc A/C.3/66/L.57/Rev.1 (UNGA Third Committee Voting Record, Syria); UNGA, ‘General Assembly Adopts

which denounced the situation and called for compliance with primary RtoP.<sup>2010</sup> This affirms that States accept secondary RtoP's discharge should also be pursuant to the UN Charter obligations conferring (i) primary responsibility for the maintenance of peace and security upon the UNSC;<sup>2011</sup> and (ii) a residual responsibility for the maintenance of such upon the UNGA.<sup>2012</sup>

However, Russia and China's vetoes highlight the way in which secondary RtoP's discharge will, irrespective of its legal status, depend upon the existence of political will, particularly that of the P5. This raises the question of whether secondary RtoP has had any effect upon the *legal consequences* for veto use. Commentators<sup>2013</sup> have argued that the veto in RtoP cases could engage the vetoing States responsibility for an internationally wrongful act. To do so, the veto must violate a legal obligation of the vetoing State, such as a violation of the duty to prevent genocide.<sup>2014</sup> There has been limited consideration by States of secondary RtoP's interplay with this method of legal redress against the use of the veto. Certainly, there is nothing to suggest that secondary RtoP strengthens the legal consequences. For example, whilst France,<sup>2015</sup> Portugal,<sup>2016</sup> the UK,<sup>2017</sup> the US<sup>2018</sup> and Germany<sup>2019</sup> all expressed disappointment at Russia and China's use of the veto in Syria, no State argued that this *could* or *should* entail *legal consequences*. Similarly, there is nothing to suggest that secondary RtoP *weakens* the legal consequences which can be attached under existing mechanisms, not least the regime on State Responsibility. Thus, secondary RtoP may not only subsume the existing legal obligations which permit the use of a veto (Article 27 (3) of the UN Charter), it may also subsume the existing legal regimes which can attach consequences to the use of the veto (ILC Articles on State Responsibility).<sup>2020</sup>

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more than Sixty Resolutions Recommended by Third Committee Including Text Condemning Grave, Systematic Human Rights Violations in Syria' (19 December 2011) UN Doc GA/11198

<<http://www.un.org/News/Press/docs//2011/ga11198.doc.htm>> accessed 5 January 2012; UNGA Res 66/176, (23 February 2012) UN Doc A/RES/66/176; UNGA Res 66/253 (21 February 2012) UN Doc A/RES/66/253; UNGA, 'General Assembly, in Resolution, Demands All in Syria 'Immediately and Visibly' Commit to Ending Violence that Secretary-General says is Ripping Country Apart' (3 August 2012) UN Doc GA/11266 <<http://www.un.org/News/Press/docs/2012/ga11266.doc.htm>> accessed 8 August 2012.

<sup>2010</sup> See e.g. Draft UNGA Res, 'The Situation in the Syrian Arab Republic' (31 July 2012) UN Doc A/66/L.57 (adopted on the 3 August 2012), paras 1-3 (condemning the violence in the State) and para 3 (recalling primary RtoP).

<sup>2011</sup> UN Charter (n 1895), arts 24 (1) and 39.

<sup>2012</sup> UN Charter, *ibid*, art 11 (2).

<sup>2013</sup> See particularly, L Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 *Review of International Studies* 445, 454 and A Peters, 'Humanity as the Alpha and Omega of Sovereignty' (2009) 20 (3) *EJIL* 513, 540.

<sup>2014</sup> Arbour and Peters, *ibid*.

<sup>2015</sup> Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627.

<sup>2016</sup> Statement of the Representative of *Portugal* to the UNSC, *ibid*.

<sup>2017</sup> Statement of the Representative of the *United Kingdom* to the UNSC, *ibid*.

<sup>2018</sup> Statement of the Representative of the *United States* to the UNSC, *ibid*.

<sup>2019</sup> Statement of the Representative of *Germany* to the UNSC, *ibid*.

<sup>2020</sup> For proposals regarding legal consequences for a failure to discharge if that failure overlaps with a breach of a States existing obligation, such as the duty to prevent genocide, see particularly, Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 2013), 454; Peters, 'Humanity as the Alpha and

Second, this phase further contributed toward whether or not the UNSC's obligation to maintain international peace and security should be reinterpreted in light of secondary RtoP. The US<sup>2021</sup> explained that the UNSC's adoption of Resolution 1970 on Libya was an example of it acting to 'support the Libyan peoples universal rights'<sup>2022</sup> and it illustrates that the UNSC, on behalf of the international community, 'will not tolerate violence of any sort against the Libyan people by their Government or security forces'.<sup>2023</sup> Whilst such practice suggests that the US could recognise the UNSC to owe an obligation to protect populations, it does not consider this a new legal obligation. In Libya, the US<sup>2024</sup> pointed to the action being taken under Chapter VII of the Charter. This suggests that they consider the *legal* authority for their actions to be their pre-existing provisions of the Charter. Similarly, the US alluded to the UNSC's obligation to protect being of a *moral* nature, stating that it was 'outraged'<sup>2025</sup> that the UNSC has 'utterly failed to address an urgent moral challenge *and* a growing threat to regional peace and security'<sup>2026</sup> in Syria. Together these aspects of practice suggest that the US does not consider secondary RtoP to confer a new legal obligation to protect upon the UNSC but, rather, it strengthens the understanding that (i) the UNSC's obligation to maintain international peace and security should be reinterpreted in light of a moral and/or political obligation to protect populations in cases involving RtoP crimes; and (ii) threats to international peace and security can arise from events inside a State's borders, not least the perpetration of RtoP crimes.

This was challenged by States like Venezuela<sup>2027</sup> and Syria.<sup>2028</sup> Following calls for the UNSC to take action to protect the Syrian population, Syria<sup>2029</sup> cautioned the UNSC against interpreting its peace and security obligation to include a protection component. Similarly, Venezuela<sup>2030</sup> warned that the UNSC cannot apply or interpret secondary RtoP until full consensus is attained in the UNGA. Notably, Venezuela<sup>2031</sup> earlier disapproved of the Outcome Document explicitly referring to the role of the UNSC because it considers the current composition of the UNSC is unrepresentative and, therefore, there is a risk that it will

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Omega of Sovereignty' (n 2013), 540 and A Peters, "The Responsibility to Protect and the Permanent Five: The Obligation to Give Reasons for a Veto" in A Nollkaemper and J Hoffmann (eds), *The Responsibility to Protect: From Principle to Practice* (Amsterdam University Press, Amsterdam 2012) 205-206.

<sup>2021</sup> Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (26 February 2011) UN Doc S/PV.6491.

<sup>2022</sup> Statement of the Representative of the *United States* to the UNSC, *ibid*.

<sup>2023</sup> Statement of the Representative of the *United States* to the UNSC, *ibid*.

<sup>2024</sup> Statement of the Representative of the *United States* to the UNSC, *ibid*.

<sup>2025</sup> Statement of the Representative of the *United States* to the UNSC, *ibid*.

<sup>2026</sup> Statement of the Representative of the *United States* to the UNSC, *ibid*.

<sup>2027</sup> Statement of the Representative of *Venezuela* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1).

<sup>2028</sup> Statement of the Representative of the *Syrian Arab Republic* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627.

<sup>2029</sup> Statement of the Representative of the *Syrian Arab Republic* to the UNSC, *ibid*.

<sup>2030</sup> Statement of the Representative of *Venezuela* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1).

<sup>2031</sup> Statement of the Representative of *Venezuela* to the UNGA, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105.

overlook some cases involving RtoP crimes due to the national political interests of the P5.<sup>2032</sup> Venezuela's position therefore highlights that political and not legal reasons can underscore why some States may challenge the view that the UNSC can have the mandate to protect.

Perhaps the most significant development over this phase was the UNSC's authorisation of collective armed force in Libya to 'protect civilians'.<sup>2033</sup> Significantly, Resolution 1973 expressly referred to the *primary RtoP* obligation of the Libyan national authorities.<sup>2034</sup> This, along with the explicit *protective objective* of the armed force,<sup>2035</sup> suggests that the UNSC authorised armed force as part of secondary RtoP. At a legal level, the important issue is that the armed force was carried out in full conformity with the existing legal regime on armed force because it had UNSC authority. Libya therefore tends to reinforce the point that armed force under secondary RtoP should comply with the existing legal regime and, therefore, the requirement for UNSC authority represents another legally binding element of secondary RtoP.

States adopted three positions on secondary RtoP following authorisation for the use of armed force in Libya. First, some States pushed for secondary RtoP to undergo further refinement. Brazil is a primary example, proposing the adoption of the concept of "Responsibility whilst Protecting"<sup>2036</sup> in order to ensure that the use of armed force was authorised only as a *last resort*.<sup>2037</sup> As discussed in chapter five, this suggests that Brazil considers that the UNSC should discharge Chapter VII enforcement measures incrementally in RtoP cases. This standpoint raises the possibility that, at least some States, consider the Outcome Document to be an instrument of soft law in light of which existing treaty provisions can be reinterpreted (e.g. UNSC's power to discharge Chapter VII non-incrementally).

The second approach adopted in the aftermath of Libya was that the Outcome Document did not formulate secondary RtoP as a doctrine capable of implementation in practice but, rather, merely committed States to 'continue consideration'<sup>2038</sup> of RtoP in the UNGA. Venezuela used the informal discussion on the concept of "Responsibility whilst Protecting"<sup>2039</sup> to argue that secondary RtoP's implementation in practice was premature and,

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<sup>2032</sup> Statement of the Representative of *Venezuela* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1).

<sup>2033</sup> UNSC Res 1973 (2011) (n 1786), preambular para 4.

<sup>2034</sup> UNSC Res 1973, *ibid*.

<sup>2035</sup> UNSC Res 1973, *ibid*.

<sup>2036</sup> UNGA/UNSC, 'Annex to the Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General: Responsibility while Protecting: Elements for the Development and Promotion of a Concept' (11 November 2011) UN Doc A/66/551-S/2011/701.

<sup>2037</sup> UNGA/UNSC, *ibid*.

<sup>2038</sup> *ibid*.

<sup>2039</sup> UNGA, 'Informal Discussion on Responsibility While Protecting' (21 February 2012). State views are available at <<http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/4002->



given the Outcome Document ‘continue consideration’<sup>2040</sup> provision, that which lacked any basis.<sup>2041</sup> Thus, this approach seems to have been partly facilitated by Brazil urging secondary RtoP to undergo further refinement.

Russia and China used the period following the Libya intervention to return to the standpoint that they had adopted on secondary RtoP during the preliminary stages of the Outcome Document’s drafting. To Russia, secondary RtoP should not be practically implemented because it remains too ‘ambiguous’.<sup>2042</sup> This illustrates that Russia does not accept secondary RtoP to have sufficient clarity to become new customary international law.<sup>2043</sup> Furthermore, Russia and China<sup>2044</sup> recalled the principle of non-intervention in internal affairs in the specific context of the perpetration of RtoP crimes in Syria.<sup>2045</sup> This suggests that both States reject reinterpreting the principles of non-intervention and respect for State sovereignty as subject to States’ national authorities protecting their populations from RtoP crimes.<sup>2046</sup> It is quite likely that these challenges to secondary RtoP’s practical implementation may have been politically motivated, after all Syria is Russia’s main ally in the Middle East. However, the challenges nevertheless highlight that some States may not even have accepted RtoP *in principle*, let alone as a *norm* which is capable of being *implemented* in practice so as to become new customary international law.

The above view contradicts the third position taken by States in the aftermath of the Libya intervention, namely that the international community needs to implement secondary RtoP more consistently in practice, not least in Syria. This standpoint was adopted by States like France, the UK and the US which took steps to try to apply political pressure on the UNSC to act effectively, including sponsoring the original UNGA Resolution on Syria.<sup>2047</sup> The significance of approaching the UNGA when the UNSC fails to act lies in the fact that it suggests that some States consider secondary RtoP as a *moral and/or political responsibility*

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informal-discussion-on-brazils-concept-of-responsibility-while-protecting> accessed 30 May 2012. (‘Informal Debate on the Responsibility While Protecting’).

<sup>2040</sup> Outcome Document (n 1772), para 139.

<sup>2041</sup> Recalling the “further consideration” provision, Venezuela argued that it is ‘concerned that UN officials use resources of the institution to *implement* the “responsibility to protect”. The best proof that there is *no consensus on this issue and its implementation* is the discussion that we are having today. We emphasise: until today, there is *no consensus on the scope and nature* of the responsibility to protect’, emphasis added. Statement of the Representative of Venezuela to the UNGA, ‘Informal Debate on the Responsibility While Protecting’ (n 2039).

<sup>2042</sup> Statement of the Representative of the Russian Federation to the UNSC, UNSC Verbatim Record (25 June 2012) UN Doc S/PV.6790.

<sup>2043</sup> On the requirement of clarity for the development of a new rule of customary international law, see e.g. Payandeh (n 1990), 481-482.

<sup>2044</sup> See especially, Statements of the Representatives of China and the Russian Federation to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627.

<sup>2045</sup> See especially, Statements of the Representatives of China and the Russian Federation to the UNSC, UNSC Verbatim Record, *ibid*.

<sup>2046</sup> On this, see e.g. the UNSG’s comments on the way in which the RtoP framework laid down at the World Summit accommodates the principle of “sovereignty as responsibility” in UNSG Report 2009, Implementing RtoP (n 1837), 7-8.

<sup>2047</sup> UN Press Release, ‘Third Committee Approves Resolution Condemning Human Rights Violations in Syria’ (n 2009) and UNGA Third Committee Voting Record, Syria (n 2009).

of the international community to engage *all available mechanisms* to ensure the protection of populations from RtoP crimes.

## 2.4 The Legal Status of Primary and Secondary RtoP: General Findings

The present author's analysis of over four hundred State views<sup>2048</sup> indicates that no State intended to formulate primary or secondary RtoP as *new* customary international law at the Summit. Furthermore, there is no evidence in subsequent State practice to support the view that either responsibility has *become* new customary international law. However, there have been some legal dimensions to the practice. Primarily, there is some support for both primary and secondary RtoP creating new interpretations of the treaty obligations that they subsume. In terms of primary RtoP, this includes the recognition (i) of a general duty to prevent RtoP crimes and that this can clarify States implementation of their existing duties in an RtoP context; and (ii) that a failure to fulfil existing duties effectively can legitimately activate secondary RtoP and, therefore, the involvement of the international community. Presently, there is limited support for these constituting binding interpretations of treaty obligations. However, this could evolve in the future in light of further State practice. In terms of secondary RtoP, there is growing support among some States for reinterpreting the UNSC's obligation to maintain peace and security in light of secondary RtoP as a *moral and/or political responsibility* to protect populations from RtoP crimes. This could be explained as an attempt to standardise the UNSC's role in mass atrocity crimes and to try to add moral and political pull upon the UNSC to curtail its discretion over the application of enforcement measures in RtoP cases.<sup>2049</sup>

Consideration was also given to whether secondary RtoP changes the existing legal regime on armed force. Elements of State approaches in Libya raise the possibility that secondary RtoP does not simply subsume the existing legal regime on armed force. For example, a clear theme in this case study was the permissibility of using armed force *for human protection purposes*.<sup>2050</sup> For instance, Colombia<sup>2051</sup> justified its vote in favour of the authorisation of armed force based on belief that the armed force was:

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<sup>2048</sup> Surveyed State views are detailed in Annex I (a)-(i).

<sup>2049</sup> The UNSC has taken a relatively ad hoc approach to recognising that its Chapter VII powers have been activated by RtoP crimes. The UNSC has expressed its "readiness" to consider RtoP-type crimes as threats to international peace and security in instruments. However, this is merely a commitment of preparedness. UNSC Resolution 1296 (2000) UN Doc S/RES/1296. For a discussion of the activation of Article 39 in the context of RtoP crimes, see Payandeh (n 1990), 494-497.

<sup>2050</sup> See particularly, Statements of Representatives of the *United States, United Kingdom, Lebanon, Bosnia and Herzegovina, Colombia, China* and the *Russian Federation* to the UNSC, UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498.

<sup>2051</sup> Statement of the Representative of *Colombia* to the UNSC, *ibid.*

‘[A]imed at protecting the civilian population from imminent attacks by a Government that, through its actions and statements, has shown that it is not up to the international responsibility of protecting its population’.<sup>2052</sup>

Arguably, this suggests an acceptance that armed force for human protection purposes *can be legitimate*. However, the implicit endorsement of the existing prohibition on armed force in the Russia-Georgia case,<sup>2053</sup> and that armed force was collective and authorised in the Libya case,<sup>2054</sup> suggests that States consider that the use of armed force for human protection purposes must still be undertaken pursuant to the existing legal regime *in order to be legal*.

The permissibility of using armed force for human protection purposes has also been endorsed in the national policies of States like the UK,<sup>2055</sup> US,<sup>2056</sup> France<sup>2057</sup> and Germany.<sup>2058</sup> With the exception of Germany,<sup>2059</sup> none of the policies mention the need for UNSC authorisation. This does not mean that these States consider they can use force absent UNSC authority, especially since they have affirmed this requirement at international level.<sup>2060</sup> However, this remains a risk given that the UK had, pre-RtoP, argued that the Charter prohibition did not extend to unauthorised armed force for human protection purposes and that other European States and the US had participated in unauthorised humanitarian interventions.<sup>2061</sup> This relates to the prospect of secondary RtoP being argued to formulate a

<sup>2052</sup> Statement of the Representative of Colombia to the UNSC, *ibid*.

<sup>2053</sup> See particularly, Statements of the Representatives of Belgium, United States and the United Kingdom to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc UN Doc S/PV.5952.

<sup>2054</sup> UNSC Res 1973 (2011) (n 1786).

<sup>2055</sup> UK Cabinet Office, ‘The National Security Strategy of the United Kingdom’ (n 1784), 48.

<sup>2056</sup> US, ‘National Security Strategy’ (2010) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 10 October 2011, 48. For an overview of the significant aspects of this policy in terms of armed force, see C Henderson, ‘The 2010 United States National Security Strategy and the Obama Doctrine of ‘Necessary Force’’ (2010) 15 (3) *Journal of Conflict & Security Law* 403.

<sup>2057</sup> *Presidence de la Republique*, ‘The French White Paper on Defence and National Security’ (n 1784), 9 and 11.

<sup>2058</sup> Federal Ministry of Defence, ‘White Paper 2006 on German Security Policy and the Future of the Bundeswehr’ (n 1784), 44. [‘Over the past few years, greater awareness of the importance of a more just world order has emerged where human rights must be protected and international humanitarian law strengthened. Not least due to the lessons learned in Kosovo, the notion is also becoming *increasingly accepted in international law* that the use of force can be necessary to avert humanitarian disasters, combat terrorist threats and protect human rights. *The international law doctrine of the Responsibility to Protect has developed as a result of the lessons learned from the intervention in Kosovo in 1999. Even if the states that have adopted this doctrine are probably still not in the majority, the debate about the Responsibility to Protect is increasingly impacting on the ways of thinking in western countries.* In the long term, this will affect the mandating of international peace missions by the United Nations UNSC *as legitimisation under international law is crucial especially when military force is used*’, emphasis added.]

<sup>2059</sup> Federal Ministry of Defence, *ibid*.

<sup>2060</sup> Statement of the Representative of France to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005), June 2005 State Views (n 1775). The United Kingdom and the United States have not expressly affirmed the need for UNSC authority in their general statements on RtoP. However, both approached the UNSC for authorisation in Libya which, as the United Kingdom Prime Minister later stated made the armed force “legal”. ‘David Cameron: Libya Action is Necessary, Legal and Right’ *The Telegraph* (London, 20 March 2011) <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8393478/David-Cameron-Libya-action-is-necessary-legal-and-right.html>> accessed 10 March 2012.

<sup>2061</sup> For an overview of State positions on the interplay between the humanitarian intervention doctrine and the prohibition on armed force, see e.g. C Gray, *International Law and the Use of Force* (3rd edn OUP, Oxford 2008) 47-51. For a discussion of State positions, including the involvement of other European States and the United States in the humanitarian intervention in Kosovo, see Gray at 39-47. See further G Evans, ‘From Humanitarian Intervention to the Responsibility to Protect’ (2006-2007) 24 *Wis. Int’l L.J.* 703. For an interesting assessment of

regional (e.g. European level /United States level) or local (e.g. United Kingdom / France) customary law with regard to unauthorised armed force to protect populations from RtoP crimes. Even if there was a claim to this in future State practice, there is no basis to suggest that this could be legalised under secondary RtoP. It would clash with the Charter obligation for UNSC authority<sup>2062</sup> and Article 103 of the Charter<sup>2063</sup> obligates States to prioritise their Charter obligations over other laws (e.g. regional rule of customary law).

Admittedly, the overwhelming majority of State views,<sup>2064</sup> the various responses to Russia's armed force in South Ossetia and the authorised armed force in Libya all suggest that the use of unilateral or unauthorised armed force under secondary RtoP would be *illegal*. Furthermore, whilst the ICJ understands that international law can sometimes simply tolerate certain acts,<sup>2065</sup> this would not apply to the unilateral or unauthorised use of armed force for human protection purposes because there is a clear prohibition on the use of armed force in both existing treaty and customary international law. There is therefore no room in which the idea of toleration could crystallise. Accordingly, the resort to unauthorised or unilateral armed force to discharge secondary RtoP would be illegal.

There could be situations where States or other actors consider it better to commit an illegal breach of the existing prohibition on armed force than to stand by whilst populations fall victim of RtoP crimes, however. We saw such a situation in State practice pre-RtoP, such as in Kosovo. Furthermore, Russia's practice in South Ossetia illustrates that a State, group of States (i.e. "coalitions of the willing") or regional organisations may nevertheless use unauthorised or unilateral armed force in RtoP cases. Additionally, this could arise if the UNSC cannot or will not act to discharge secondary RtoP. Syria could be one possible case. At the time of writing the UNSC remains unable to coercively discharge secondary RtoP

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the role of these States in Kosovo, see N White, 'The Legality of Bombing in the Name of Humanity' (2000) 5 (1) Journal of Conflict & Security Law 27.

<sup>2062</sup> UN Charter (n 1895), art 42.

<sup>2063</sup> *ibid*, art 103 ['In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'].

<sup>2064</sup> For e.g. Statements of the Representatives of *Peru, Canada, Croatia, Pakistan, Chile, France, South Africa, Algeria and New Zealand* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005), June 2005 State Views (n 1775); Statements of the Representatives of *Brazil, the United States, the United Kingdom, Andorra and Korea* to the UNGA, 'High-Level Meeting of the Plenary' (22 June 2005), June 2005 State Views (n 1775); Statements of the Representatives of the *Marshall Islands, Sweden and Guatemala* to the UNGA, 'High-Level Meeting of the Plenary' (April 2005), April 2005 State Views (n 1775); Statements of the Representatives of *Sri Lanka, Tanzania and Viet Nam* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005), June 2005 State Views (n 1775); Statement of the Representative of *Spain* to the UNGA, 'High-Level Meeting of the Plenary' (1 July 2005), July 2005 State Views (n 1775) and Statements of the Representatives of *Brazil and Indonesia* to the UNGA, 'High-Level Meeting of the Plenary' (1 August 2005), August 2005 State Views (n 1775).

<sup>2065</sup> For e.g. third States' recognition of Kosovo's unilateral declaration of independence because international law neither expressly permits nor prohibits States from recognising Statehood. See the *Declaration of Judge Simma, Advisory Opinion on the Legality of Kosovo's Unilateral Declaration of Independence*, ICJ Reports 2010, p. 3.

because of the unwillingness of States, such as Russia<sup>2066</sup> and China.<sup>2067</sup> Should other States prioritise respect for existing legal regime on armed force *over* the protection of the Syrian population from RtoP crimes? The very fact that such questions are still relevant in present practice suggests that, legally, we have come no further forward from the 1990s debate on the legality vs. legitimacy of humanitarian interventions.<sup>2068</sup> This is significant given that this was the very debate that RtoP was designed to resolve.<sup>2069</sup> In addition, it raises the question of whether secondary RtoP has had any impact upon the perceived *legitimacy* of unilateral or unauthorised armed force for human protection purposes. This writer would suggest that in cases where unilateral or unauthorised armed force is used because the UNSC fails to discharge secondary RtoP, the Outcome Document's express recognition of the international community's role in protecting populations could strengthen the contention that such armed force is both *morally and politically legitimate*.

These findings relate to broader themes in RtoP literature regarding legal status.<sup>2070</sup> On the one hand, they strengthen some of the arguments made by commentators with regard to the legal status of primary and secondary RtoP. Whilst commentators<sup>2071</sup> have noted that primary RtoP relates to States existing duties, such as the duty to prevent genocide, there has been limited consideration of whether primary RtoP (i) constitutes a legal obligation in its own right; (ii) may do more than simply repackage States existing duties by creating new interpretations to treaty duties (e.g. promote new forms of accountability in relation to States' violations of existing human rights, humanitarian law duties) or, indeed, whether it could generate a new rule of customary international law over time (e.g. States' duties with respect to a collective right to protection). In relation to secondary RtoP, Payandeh<sup>2072</sup> argues that its legal value lies in its capacity to create *new interpretations* of the existing treaty provisions it covers, particularly those under the UN Charter.<sup>2073</sup> In this line, Payandeh argues

<sup>2066</sup> Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Records (4 October 2011) UN Doc S/PV.6627, (4 February 2012) UN Doc S/PV.6711 and (19 July 2012) UN Doc S/PV.6810.

<sup>2067</sup> Statement of the Representative of *China* to the UNSC, UNSC Verbatim Records, *ibid*.

<sup>2068</sup> See particularly, International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, Ottawa 2001) 1-9.

<sup>2069</sup> International Commission on Intervention and State Sovereignty, *ibid*.

<sup>2070</sup> See particularly: Payandeh (n 1990); Strauss, "A Bird in the Hand is Worth Two in the Bush" (n 1778), 25-57; Welsh and Banda (n 1778); Stahn (n 1778) and L Glanville, "The International Community's Responsibility to Protect" in S E Davies and L Glanville (eds), *Protecting the Displaced: Deepening the Responsibility to Protect* (Martinus Nijhoff, Leiden 2010) 196-200; W Burke-White, "Adoption of the Responsibility to Protect" in J Genser and I Cotler (eds), *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time* (OUP, Oxford 2012) 22-23.

<sup>2071</sup> See especially, A Bellamy and R Reike, "The Responsibility to Protect and International Law" in Bellamy, Davies and Glanville (n 1773), 89-94 [outlining the legal duties which primary RtoP interconnects with under international criminal, humanitarian and human rights law] and D Scheffer, "Atrocity Crimes Framing the Responsibility to Protect" in R Cooper and J Kohler (eds), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (Palgrave Macmillan, New York 2009) 77-98 [outlining the interplay between the RtoP framework and the legal basis and development of international criminal law].

<sup>2072</sup> Payandeh (n 1990).

<sup>2073</sup> Payandeh, *ibid*, 491-92 [arguing that secondary RtoP may be used as a "dynamic interpretation" of UN Charter obligations].

that it is not secondary RtoP ‘as such that will become a norm of international law, but rather a concrete norm of international law that will change in light of the responsibility to protect’.<sup>2074</sup> The present author’s examination of over four hundred State views<sup>2075</sup> upholds this interpretation. There is nothing to suggest that States intended to formulate secondary RtoP as a new customary international law which obligated the international community to protect populations. Instead, the intention at the Summit was for secondary RtoP to be formulated as a new political/moral framework which subsumed obligations under the UN Charter in the specific context of preventing and responding to RtoP crimes.<sup>2076</sup> As Canada<sup>2077</sup> argued, secondary RtoP’s value lies in its capacity to bring a ‘new purpose’<sup>2078</sup> to the UN and its implementation of the UN Charter.

This trend in State views also adds support to some commentator<sup>2079</sup> arguments regarding secondary RtoP’s potential to *strengthen* existing interpretations of treaty provisions. For example, it is argued that secondary RtoP reinforces the expanded interpretation of Article 39 of the UN Charter,<sup>2080</sup> specifically the wider notion of threats to peace and international security which arose during the 1990s.<sup>2081</sup> Admittedly, elements of practice to date suggest that secondary RtoP reinforces this interpretation of Article 39, not least the explicit link between the UNSC’s Chapter VII mandate and the international community’s commitment to utilise Chapter VII enforcement measures in order to protect populations from RtoP crimes.<sup>2082</sup> However, practice also suggests that whether or not this interpretation is utilised in RtoP cases *remains* at the discretion of the UNSC. As noted in chapter four, this discretion was clearly in operation in Syria when Russia and China suggested that the human rights

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<sup>2074</sup> Payandeh, *ibid*.

<sup>2075</sup> See Annex I (a)-(i).

<sup>2076</sup> Burke-White takes a similar view, noting that ‘the relevant provisions of the Outcome Document are political statements by heads of government and the General Assembly reiterating existing international legal rules, potentially laying the groundwork for the establishment of new legal obligations in the future. More specifically, the document reaffirms existing rules of treaty and customary international law prohibiting and requiring the prevention of war crimes, crimes against humanity, and genocide. While shifting the focus from the prosecution of such crimes to their prevention, the Outcome Document builds on, rather than creates legal rules’. Burke-White (n 2070), 23.

<sup>2077</sup> Statement of the Representative of Canada to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005), June 2005 State Views (n 1775).

<sup>2078</sup> Canada, *ibid*.

<sup>2079</sup> For e.g. Strauss, “A Bird in the Hand is Worth Two in the Bush” (n 1773), 48-54; S Rosenberg, “Responsibility to Protect: A Framework for Prevention” in Bellamy, Davies and Glanville (n 1773), 191; P Akhavan, ‘Preventing Genocide: Measuring Success by What Does Not Happen’ (2011) 22 (1) *Crim. L. F.* 1, 13-16; Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’ (n 2013), 445-458; Peters, ‘Humanity as the Alpha and Omega of Sovereignty’ (n 2013), 539 and Payandeh (n 1990), 499-501 [with regard to its effect upon the UNSC P5].

<sup>2080</sup> See particularly, Peters, ‘Humanity as the Alpha and Omega of Sovereignty’, *ibid*, 538-539; A M Slaughter, ‘Security, Solidarity and Sovereignty: The Grand Themes of UN Reform’ (2005) 99 (3) *AJIL* 619, 626-627; Payandeh, *ibid*, 494-497. See also J Schott, ‘Chapter VII as Exception: UNSC Action and the Regulative Ideal of Emergency’ (2007) 6 (1) *Nw. Univ. J. Int’l Hum Rts.* 24.

<sup>2081</sup> Peters, Slaughter, Payandeh, *ibid*.

<sup>2082</sup> As Payandeh writes: ‘Unlike Article 24(1) of the U.N. Charter, which refers only to the responsibility of the UNSC for peace and security, the responsibility to protect links the power of the UNSC explicitly to the humanitarian responsibility for the well-being of individuals’. Payandeh, *ibid*, 501.

violations occurring were ‘not sufficiently egregious’<sup>2083</sup> to warrant action under Chapter VII. The present author’s findings regarding secondary RtoP’s legal status also tend to challenge other arguments in the literature. Some commentators<sup>2084</sup> argue that the Outcome Document is at most soft law because of the qualified language which is used in its secondary RtoP provisions.<sup>2085</sup> There are reasons to be cautious regarding this. State practice suggests that secondary RtoP subsumes existing treaty obligations, such as those under the UN Charter, and therefore that elements of it are legally binding. Furthermore, qualified language may merely suggest that the international community retains a margin of appreciation with regard to their discharge of secondary RtoP. Legal obligations often embody such discretion and, as such, the use of qualified language need not necessarily be considered as an indication of soft law. Indeed, the UNSC’s mandate to maintain peace and security is effectively a discretionary obligation since its discharge depends upon there being sufficient political will to recognise that a situation falls within the scope of Article 39. Nevertheless, the legal status of this is unquestioned because, whilst entailing a subjective aspect, it remains a provision of a legally binding treaty. However, there is some support for the opposing view in the literature. Burke-White argues that terming the Outcome Document as an instrument of soft law ‘creates the misperception of a legally binding rule and may lead States worried about creeping legalisation to denounce the norm in an effort to avoid its legal codification’.<sup>2086</sup> At one level, this is almost a prophetic statement. Secondary RtoP’s discharge in Libya created resurgence in State protests regarding secondary RtoP’s role in contemporary international affairs. Conversely, we have to bear in mind that soft law has been considered to represent a suitable compromise between those States who would accept a binding duty and those who would resist attempts to formulate a binding duty.<sup>2087</sup> The field of minority protection is a useful illustration. Whilst the UN Declaration on the Rights of Persons Belonging to Minorities remains an instrument of soft law,<sup>2088</sup> it remains significant because (i) it maps out whether there is relative international consensus with respect to the nature and scope of

<sup>2083</sup> Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627.

<sup>2084</sup> See especially, Strauss, “A Bird in the Hand is Worth Two in the Bush” (n 1773), 25-57; Welsh and Banda, (n 1778); Stahn (n 1778) and Shaffer and Pollack, ‘Hard Versus Soft Law in International Security’ (n 1778), 1232.

<sup>2085</sup> This writer does not find all of these arguments compelling. For example, Strauss asserts that the “further consideration” provision is one aspect of the Outcome Document which points to it being “soft law” because it qualifies RtoP’s capacity to become a norm of customary international law. As authority, Strauss cites the ICJ’s reasoning in the *North Sea Continental Shelf Case*. This writer would suggest that caution should be taken here. The ICJ was addressing the issue of whether a treaty provision could generate a norm of customary international law. The principle therefore seems to have little bearing upon the capacity for a General Assembly Resolution, such as the Outcome Document, to become a customary international law rule. See Strauss, “A Bird in the Hand is Worth Two in the Bush”, *ibid*, 33 and *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, 3, para 77.

<sup>2086</sup> Burke-White (n 2070), 2.

<sup>2087</sup> Chinkin, ‘The Challenge of Soft Law’ (n 1778), 861.

<sup>2088</sup> As Weller explains: ‘[t]here has been no movement seeking to convert the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities into a binding legal standard’. M Weller (ed), *Universal Minority Rights* (OUP, Oxford 2007), preface.

States' duties in the field of minority protection; and (ii) was less controversial among States because of its essentially political nature than that of Article 27 of the ICCPR. Whilst there remains resistance to secondary RtoP's capacity to be discharged in practice, we have to offset this against the fact that, had the RtoP framework been proposed in the sense of new legally binding obligations, we would be unlikely to be witnessing its role in practice seven years later. Rather, those States who are sensitive to any weakening of the principles of non-interference and the prohibition on armed force would at the very least have issued reservations at the time of its adoption, greatly restricting secondary RtoP's role in practice. Perhaps most significantly, the field of minority protection reminds us that we need to bear in mind the significant impact that terming the Outcome Document as soft law can have upon those States who do not fear 'creeping legalisation'<sup>2089</sup> as much. The UN Declaration on the Rights of Persons Belonging to Minorities can be influential because it encourages willing States to act in conformity with the minority rights therein and, moreover, for States to put pressure on those who are failing to act in conformity with those rights.<sup>2090</sup> Thus, labelling the Outcome Document as soft law can help to strengthen the political legitimacy of efforts to apply secondary RtoP in practice, including by pressurising those members of the P5 who refuse to give effect to secondary RtoP in Syria.

Finally, the findings tend to challenge arguments that there is a prospect for secondary RtoP to develop the law on the unauthorised use of armed force for human protection purposes. The first argument is that the Outcome Document could itself provide an opening for countering claims that using unilateral or unauthorised armed force to discharge secondary RtoP is *illegal*. Bellamy,<sup>2091</sup> Stahn<sup>2092</sup> and other commentators<sup>2093</sup> have noted that there could be some legal significance to the fact that the Outcome Document does not actually *exclude* unilateral or unauthorised armed force for human protection purposes. The present author does not find this argument compelling. Primarily, it tends to undermine the significance of the Outcome Document's explicit statement that secondary RtoP should be discharged 'through the UNSC, in accordance with the UN Charter'.<sup>2094</sup> Context is important here. Examination of the drafting history of the Outcome Document suggests that this

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<sup>2089</sup> Burke-White (n 2070), 2.

<sup>2090</sup> As Eide notes: '[p]olitical mechanisms can be useful in increasing the pressure on States which are reluctant to cooperate in the implementation of minority rights'. A Eide, "Mechanisms for Supervision and Remedial Action" in Weller, *Universal Minority Rights* (n 2088), 25.

<sup>2091</sup> Bellamy has observed that the Outcome Document's failure to prohibit unauthorised action may provide 'a window for lawyers to defend unauthorised intervention by reference to the outcome document'. A Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (2006) 20 (2) *Ethics and International Affairs* 143, 166.

<sup>2092</sup> Stahn (n 1778), 109.

<sup>2093</sup> Payandeh (n 1990), 507-508.

<sup>2094</sup> Outcome Document (n 1772), para 139.



provision was incorporated into the text in response to some States<sup>2095</sup> arguing that secondary RtoP challenged the UN Charter by seeking to codify humanitarian intervention. We should therefore not attach too much significance to the fact that the Outcome Document does not explicitly exclude unilateral or unauthorised armed force. Rather, it would seem, that the drafters intended for the existing Charter prohibition on this to be read into the provisions on secondary RtoP via the inclusion of the requirement for its discharge to be ‘in accordance with the UN Charter’.<sup>2096</sup>

The second argument, advanced by Bellamy,<sup>2097</sup> is that the use of unauthorised force for human protection purposes could fall outside the scope of the Charter prohibition.<sup>2098</sup> Article 2 (4) of the UN Charter prohibits armed force against the sovereignty and territorial integrity of a State or ‘in any other manner inconsistent with the Purposes of the United Nations’.<sup>2099</sup> The Purposes entail the promotion of international respect for human rights.<sup>2100</sup> According to Bellamy,<sup>2101</sup> the use of force to protect populations from RtoP crimes could be argued to fall within the remit of this Purpose and, therefore, outside the legal reach of the Charter prohibition. Essentially, Bellamy is raising the possibility of using the argument advanced in earlier practice by proponents of humanitarian intervention (e.g. the UK). That is, the view that such armed force fell outside the Charter prohibition because it was undertaken to uphold human rights and, therefore, was in pursuit of the purposes of the United Nations.<sup>2102</sup> Again, the present author does not find this argument compelling. Admittedly, some State views are resonant of the earlier divisions regarding whether humanitarian intervention could be legally reconciled with the Charter prohibition. For example, in earlier practice China argued that there was no scope for this because the armed force was still being launched against a States sovereignty and territorial integrity.<sup>2103</sup> China holds onto this interpretation today.<sup>2104</sup> However, this should be offset against the fact that, since the Summit, no State has

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<sup>2095</sup> Statements of the Representatives of *Cuba, Belarus, Qatar, Egypt, Côte d’Ivoire, Colombia, Bangladesh* and *Indonesia* to the UNGA, ‘High-Level Meeting of the Plenary’ (April 2005), April 2005 State Views (n 1775); Statements of the Representatives of *Cuba, Algeria, Pakistan, Russian Federation, Iran* and *Singapore* to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005), June 2005 State Views (n 1775); Statement of the Representatives of the *Democratic Republic of Korea* and *Brazil* to the UNGA, ‘High-Level Meeting of the Plenary’ (22 June 2005), June 2005 State Views (n 1775); Statement of the Representatives of *Viet Nam, Sri Lanka* and *Venezuela* to the UNGA, ‘High-Level Meeting of the Plenary’ (30 June 2005), June 2005 State Views (n 1775); Statement of the Representative of *Argentina* to the UNGA, ‘High-Level Meeting of the Plenary’ (July 2005), July 2005 State Views (n 1775); Statements of the Representatives of *Cuba, Algeria, Mauritania (on behalf of the African Group), Malaysia (on behalf of the Non-Aligned Movement)* and *Syria* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005), WFM Report (n 1775); Statement of the Representative of *Cuba* to the UNGA, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.81 and Statement of the Representative of *Zimbabwe* to the UNGA, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.4.

<sup>2096</sup> Outcome Document (n 1772), para 139.

<sup>2097</sup> Bellamy, *The Global Effort to End Mass Atrocities* (n 1773), 91.

<sup>2098</sup> Bellamy, *ibid.*

<sup>2099</sup> UN Charter (n 1895), art 2 (4).

<sup>2100</sup> *ibid.*, art 1 (3).

<sup>2101</sup> Bellamy, *The Global Effort to End Mass Atrocities* (n 1773), 91.

<sup>2102</sup> Gray (n 2061), 39-51.

<sup>2103</sup> Gray, *ibid.*

<sup>2104</sup> Statement of *China* to the UNSC, UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498.

suggested that unauthorised armed force can be reconciled with the Charter prohibition. Rather, the majority of States consider that the use of armed force to discharge secondary RtoP should comply with Article 42 of the Charter by having the authorisation of the UNSC.<sup>2105</sup> Whilst it is still too early to draw any definitive conclusions from this practice, it raises the possibility that States have moved away from attempts to reconcile the use of unauthorised armed force for human protection purposes with the Charter prohibition. Instead, States seem to understand that they owe (i) the general obligation to refrain from armed force in international relations; and (ii) the obligation to gain UNSC authorisation for the use of armed force. One explanation for this could be that secondary RtoP's adoption at the Summit to some extent defeated arguments surrounding the wider concept of humanitarian intervention. To this effect, it codified a political consensus that there is *no absolute prohibition* on the use of armed force and that authorised and collective armed force for human protection purposes is *both* legal and legitimate. The present author would argue that practice to date therefore sustains the majority view in the existing literature on secondary RtoP's armed force component.<sup>2106</sup> That is, that the secondary RtoP codified in the Outcome Document does not create any *new* legal rules regarding the use of armed force but, rather, establishes a *political legitimacy* for using armed force to protect populations from RtoP crimes in cases like Libya.<sup>2107</sup>

<sup>2105</sup> These include: Statement of the Representatives of *Australia* to the UNGA, 'High-Level Meeting of the Plenary' (28 July 2005); Statements of the Representatives of *Canada, Chile, China, European Union, France and New Zealand* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005); Statement of the Representative of the *United States* to the UNGA, 'High-Level Meeting of the Plenary' (22 June 2005); Statements of the Representatives of *Colombia, Dominica (on behalf of CARICOM), Israel and Tanzania* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005). June-July 2005 State Views (n 1775).

<sup>2106</sup> The following are good examples of this position: G Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings, Washington D.C. 2008) 223-41; Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (n 2013), 456; Welsh and Banda (n 1778), 225; S Breau, 'The Impact of the Responsibility to Protect on Peacekeeping' (2007) 11 (3) *Journal of Conflict & Security Law* 429, 440 and 464; H Nasu, 'Operationalising the "Responsibility to Protect" and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict' (2009) 14 (2) *Journal of Conflict & Security Law* 209, 219; E McClean, 'The Responsibility to Protect: The Role of International Human Rights Law' (2008) 13 (1) *Journal of Conflict and Security Law* 123, 129; J McCarthur, 'A Responsibility to Rethink? Challenging Paradigms in Human Security' (2008) 63 *Int'l J.* 422, 431-33 and N Wheeler and F Egerton, 'The Responsibility to Protect: 'Precious Commitment' or a Promise Unfulfilled?' (2009) 1 *Global Responsibility to Protect* 114, 128-29; J Brunee and S Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?' in Bellamy, Davies and Glanville (n 1773), 71-79 and J Sarkin, 'Is the Responsibility to Protect an Accepted Norm of International Law in the Post-Libya Era? How its Third Pillar Ought to Be Applied' (2012) 1 *Groningen Journal of International Law* 11-48, 21-28.

<sup>2107</sup> Some commentators consider that the political legitimacy of using armed force for human protection purposes was confirmed in UNSC Resolution 1973's explicit link between armed force and protecting civilians in Libya. See especially, J Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP' (2011) 25 (3) *Ethics & International Affairs* 255, 258-260; A Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) 25 (3) *Ethics & International Affairs* 263, 263-264; Shaffer and Pollack, 'Hard Versus Soft Law in International Security' (n 1778), 1235-1236 and A Bellamy and P D Williams 'The New Politics of Protection? Côte d'Ivoire, Libya, and the Responsibility to Protect' (2011) 87 (4) *Int'l Aff.* 825, 825.

### 3 The Character of Primary and Secondary RtoP

Determining the character of primary and secondary RtoP is important because it can help to clarify some of the approaches taken in practice with respect to their legal status. For example, if secondary RtoP is not a binding duty, then can we expect anything *but* the UNSC to *fail* to act in accordance with it in cases like Syria? Furthermore, secondary RtoP's character merits consideration because it has become a major theme in the literature.<sup>2108</sup> Notably, primary RtoP's character receives much less attention in present literature. Discussion of primary RtoP is limited to noting its overlap with States duties under existing treaty and customary international law.<sup>2109</sup> This has led to the presumption that, because States already have duties to protect their populations from RtoP crimes, primary RtoP was formulated as a *duty* at the Summit.<sup>2110</sup> There is some merit to this view. The Outcome Document (i) confers primary RtoP on the specific bearer ('each individual State'<sup>2111</sup>) to which duties are assigned;<sup>2112</sup> (ii) suggests that primary RtoP's implementation is mandatory (i.e. the explicit provision that State undertake to 'act in accordance'<sup>2113</sup> with it); and (iii) clarifies that the only discretion that States have is in terms of the specific means that they use to discharge primary RtoP (e.g. to prevent RtoP crimes through 'appropriate and necessary means'<sup>2114</sup>). This structure tends to overlap with the traditional formulation of States human rights duties, such as the legally binding duties with respect to minority rights in Article 27 of the ICCPR.<sup>2115</sup> Specifically, primary RtoP overlaps with this duty (i) by being conferred on a particular bearer (e.g. "State Parties to the present Covenant"<sup>2116</sup> / 'each individual State'<sup>2117</sup>); (ii) its specificity in terms of the aim of the duty (e.g. to ensure that minorities are 'not denied'<sup>2118</sup> the rights therein / to prevent RtoP crimes in the State<sup>2119</sup>); and (iii) programmatic nature (i.e. margin of appreciation regarding the specific means used to

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<sup>2108</sup> See especially, Payandeh (n 1990); Strauss, "A Bird in the Hand is Worth Two in the Bush" (n 1773), 25-57; Welsh and Banda (n 1778); Glanville, "The International Community's Responsibility to Protect" (n 2070), 196-200 and Stahn (n 1778), 118-119.

<sup>2109</sup> See especially, Bellamy and Reike (n 2071), 89-94 [outlining the legal duties which primary RtoP interconnects with under international criminal, humanitarian and human rights law] and Scheffer (n 2071), 77-98 [outlining the interplay between the RtoP framework and the legal basis and development of international criminal law].

<sup>2110</sup> See particularly, Stahn (n 1778), 118-119.

<sup>2111</sup> Outcome Document (n 1772), para 138.

<sup>2112</sup> On this requirement for a duty, see especially Cunliffe (n 1926), 55. See also K Tan, "The Duty to Protect" in T Nardin and M Williams (eds), *Humanitarian Intervention* (New York University Press, New York 2006) 95; Welsh and Banda, (n 1778), 217-226 and Glanville, "The International Community's Responsibility to Protect" (n 2070), 295-297.

<sup>2113</sup> Outcome Document (n 1772), para 138.

<sup>2114</sup> Outcome Document, *ibid*.

<sup>2115</sup> International Covenant on Civil and Political Rights 1966 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 27. (ICCPR).

<sup>2116</sup> Preamble, *ibid*.

<sup>2117</sup> Outcome Document (n 1772), para 138.

<sup>2118</sup> ICCPR (n 2115) art 27.

<sup>2119</sup> Outcome Document (n 1772), para 138.

implement Article 27 / discharging primary RtoP through ‘appropriate and necessary means’<sup>2120</sup>). The character of secondary RtoP is less clear, however. Accordingly, a useful starting point for our discussion of its character is to consider the approaches which have been adopted to this issue in present RtoP literature.

### 3.1 Duty, Right or Responsibility? Present Literature on the Character of Secondary RtoP

Secondary RtoP has been characterised in one of three ways in present literature, specifically as a (i) *duty to protect* populations from RtoP crimes<sup>2121</sup> (e.g. duty of care<sup>2122</sup> or duty to act<sup>2123</sup>); (ii) right to *protect* populations from RtoP crimes;<sup>2124</sup> and (iii) *responsibility to protect* populations from RtoP crimes.<sup>2125</sup> The present author considers that some arguments inherent in each approach are persuasive, whilst others are not compelling.

#### 3.1.1 Duty to Protect

There are two persuasive aspects to assessments of whether secondary RtoP entails the character of a binding duty. First, commentators correctly point to the fact that the main impediment to recognising secondary RtoP as a duty or obligation lies in the fact that the Outcome Document does *not* identify a *specific bearer* but, instead, attaches secondary RtoP to the somewhat open-ended “international community”.<sup>2126</sup> Whilst we saw in chapter two

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<sup>2120</sup> Outcome Document, *ibid*.

<sup>2121</sup> See particularly, Arbour (n 2013); Strauss, “A Bird in the Hand is Worth Two in the Bush” (n 1773), 51-54; Akhavan (n 2079), 13-16 [on secondary RtoP and the duty to prevent genocide]; Stahn (n 1778); Peters, ‘Humanity as the Alpha and Omega of Sovereignty’ (n 2013), 539; Payandeh (n 1990), 499-501; Nasu (n 2106), 216-234; J Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (OUP, Oxford 2010) 15-20 [examining whether armed force element is a duty rather than a right].

<sup>2122</sup> Arbour, *ibid*.

<sup>2123</sup> For e.g. Peters, ‘Humanity as the Alpha and Omega of Sovereignty’ (n 2013), 539; Payandeh (n 1990), 501 and Nasu (n 2106), 216-234.

<sup>2124</sup> Discussion of the way in which secondary RtoP contributes to moves away from, or an entrenchment of, a “right to intervene” is a major theme in RtoP literature. The following can be consulted as mere examples of present consideration of whether secondary RtoP entails the character of a “right”: Peters, *ibid*, 533-535; Slaughter (n 2080), 621; Arbour (n 2013), 447-450; Brune and Toope (n 2107), 76; A Orford, ‘From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept’ (2011) 3 *Global Responsibility to Protect* 400, 401 and R Mani and T G Weiss, ‘RtoP’s Missing Link, Culture’ (2011) 3 *Global Responsibility to Protect* 451, 457.

<sup>2125</sup> See especially, A Orford, *International Authority and the Responsibility to Protect* (CUP, Cambridge 2011) 25-27; Strauss, “A Bird in the Hand is Worth Two in the Bush” (n 1773), 48; Payandeh (n 1990), 482-484 and 508-513; Welsh and Banda (n 1778), 216-220; L Glanville, ‘The Responsibility to Protect Beyond Borders’ (2012) 12 (1) *Hum Rts. L. Rev.* 1, 18-19 and further at 27-30; Peters, ‘Humanity as the Alpha and Omega of Sovereignty’, *ibid*, 540; A Bird, ‘Third State Responsibility for Human Rights Violations’ (2010) 21 (4) *EJIL* 883, 886-888 [on the specific issue of the way in which secondary RtoP can be grounded in the “duty to cooperate” inherent in the ILC Articles on State Responsibility]. Brune and Toope, *ibid*, 74-77. For a discussion of the “obligation to protect” in the context of the framework of the ILC Articles on State Responsibility for an Internationally Wrongful Act, see generally M Hakimi, ‘State Bystander Responsibility’ (2010) 21 (2) *EJIL* 341.

<sup>2126</sup> For e.g. Cunliffe argues that ‘not a single formulation of the doctrine to date is able succinctly to express and logically to demonstrate that there is a single, identifiable agent formally obligated to act or intervene in a

that examination of State views enables us to map out at least a working definition of the “international community”, there is a crucial difference between delineating *which actors can discharge* secondary RtoP and those *which bear* secondary RtoP as a general and binding “duty”. Second, the Outcome Document does *not identify any consequences for a failure to discharge* secondary RtoP, something that should be in place if secondary RtoP was intended to entail the character of a duty.<sup>2127</sup> Notably, the preceding section outlined that no consequences for a failure to discharge secondary RtoP have been developed or, indeed, proposed for development, in subsequent practice. For these reasons, this writer considers that secondary RtoP’s character cannot be ascribed to that of duty.

This writer does not find proposals regarding the ways in which secondary RtoP could be “perfected”<sup>2128</sup> as a duty to be compelling either. It is important to recall that there is no widespread support among States for formulating secondary RtoP as a binding duty. For example, during drafting of the Outcome Document the US explicitly argued that the UNSC has never been interpreted to have a duty to authorise enforcement measures.<sup>2129</sup> If the drafters had pressed for secondary RtoP to be accepted as a binding duty to protect populations then this would have quite likely led to challenges over undermining the UNSC’s discretion over whether or not to authorise the application of Chapter VII measures in RtoP cases. This would have probably led to deadlock over the RtoP framework at the Summit. Furthermore, the potentially significant implications inherent in “perfecting” secondary RtoP in a manner akin to the duty to prevent genocide extraterritorially should be borne in mind. Arbour infers that the existence of a “duty of care” could be based in the ‘three elements’<sup>2130</sup> approach flowing from the ICJ’s interpretation of the duty to prevent genocide in the *Bosnia Genocide Case*.<sup>2131</sup> Arbour proposes an expanded version of the ICJ’s notion of proximity which suggests that the duty to prevent genocide falls particularly on

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particular situation’. Cunliffe (n 1926), 55. See also Tan (n 2112), 95; Welsh and Banda, *ibid*, 217-226 and Glanville, “The International Community’s Responsibility to Protect” (n 2070), 295-297.

<sup>2127</sup> As Alvarez notes: ‘RtoP poses less serious but other troubling problems if taken seriously as legal principle. For international lawyers who worship at the shrine of the Articles of State Responsibility, all international legal persons are legally liable when they either take wrongful action or fail to act when action is demanded by international law. If there is such a thing as a responsibility to protect, the legal mind naturally assumes that a failure to exercise such responsibility is an internationally wrongful act entailing the usual panoply of potential remedies, including the legal liability of the wrongful actor and the potential for countermeasures against that actor by others’. J E Alvarez, ‘The Schizophrenias of RtoP’ (Panel Presentation at the ‘Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference’, The Hague, 30 June 2007) <<http://www.asil.org/pdfs/r2pPanel.pdf>> accessed 10 August 2012. On the absence of consequences for a failure to discharge secondary RtoP and the significance for this for its character, see particularly Stahn (n 1778), 118 and Strauss, “A Bird in the Hand is Worth Two in the Bush” (n 1773), 53. Non-accountability under legal mechanisms is said to be a feature of an instrument entailing “soft law” character. For a good discussion of this see Chinkin, ‘The Challenge of Soft Law’ (n 1778), 865-866. For proposals regarding legal consequences for a failure to discharge if that failure overlaps with a breach of a States existing obligation, such as the duty to prevent genocide, see particularly, Arbour (n 2013), 454 and Peters, ‘Humanity as the Alpha and Omega of Sovereignty’ (n 2013), 540.

<sup>2128</sup> See especially, Arbour, *ibid*, 451-455 and Tan (n 2112), 96.

<sup>2129</sup> Letter of the US Ambassador, John Bolton (n 1793), 1.

<sup>2130</sup> Arbour (n 2013), 451.

<sup>2131</sup> Arbour, *ibid*, 449-455.

States who are closest to the situation (e.g. neighbouring States).<sup>2132</sup> Arbour considers that under the “duty of care” all reasonable steps to discharge secondary RtoP should be borne both by (i) States who are most geographically proximate to the RtoP situation;<sup>2133</sup> and (ii) States who are proximate to the situation due to wider links such as historical, political and economic ties.<sup>2134</sup> This writer would suggest that the effectiveness of this approach could have particular policy implications in RtoP cases involving minorities. In such cases, one could expect that the Kin State of the minority group may be the most proximate (e.g. Russia and Russian citizens in South Ossetia).<sup>2135</sup> At a policy level, suggesting that such States should be the chief implementers of the “duty of care” may lead to the Kin State of the minority group inappropriately invoking this “duty” to justify their interference or intervention in the neighbouring State, thereby potentially undermining those existing minority protection principles which aim to restrict excessive interference of the Kin State.<sup>2136</sup>

### 3.1.2 Right to Protect

A persuasive view in this section of the literature<sup>2137</sup> is that it is difficult to reconcile secondary RtoP as a *general right to intervene/protect* because rights are discretionary in terms of whether they *are* discharged and the specific *ways* in which they are discharged.<sup>2138</sup> The Outcome Document’s qualified language tends to resonate with the discretionary nature of rights. Discretion comes through in the Outcome Document provisions (i) for secondary RtoP to be discharged ‘through the UNSC [...] on a *case-by-case basis*’;<sup>2139</sup> and (ii) that the international community is ‘*prepared to act*’<sup>2140</sup> in a ‘timely and decisive’<sup>2141</sup> manner. These

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<sup>2132</sup> Arbour, *ibid*, 454-55.

<sup>2133</sup> Arbour, *ibid*, 454.

<sup>2134</sup> Arbour, *ibid*.

<sup>2135</sup> On this see, N Turner and N Otsuki, *The Responsibility to Protect Minorities and the Problem of the Kin State* (UN University, Tokyo 2010) 2-3.

<sup>2136</sup> See e.g. OSCE: High Commissioner for National Minorities, *The Bolzano/Bozen Recommendations on National Minorities and Inter-State Relations and Explanatory Note* (OSCE HCNM, the Netherlands 2008) and Venice Commission, ‘Report of the Preferential Treatment of National Minorities by their Kin State’ (2001) Doc. CDL/INF <[http://www.venice.coe.int/docs/2001/CDL-INF\(2011\)019-e.pdf](http://www.venice.coe.int/docs/2001/CDL-INF(2011)019-e.pdf)> accessed 18 June 2012.

<sup>2137</sup> See e.g. Peters, ‘Humanity as the Alpha and Omega of Sovereignty’ (n 2013), 533-535; Slaughter (n 2080), 621; Arbour (n 2013), 447-450; Bruneau and Toope (n 2107), 76; Orford, ‘From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept’ (n 2124), 401 and Mani and Weiss (n 2124), 457.

<sup>2138</sup> On the discretionary character of “rights” in the specific context of the “right to intervene” see Arbour (n 2013), 447. We see this discretion coming through in the African Union’s right to intervene in cases involving mass atrocity crimes which is imposed by 4 (h) of its Constitutive Act. It provides that the Union has the right to ‘intervene in a Member State’ but it does not suggest that they *must* intervene. This is pursuant to all rights entailing some discretion over whether they are implemented at all. Furthermore, it provides that the right empowers the Union to ‘intervene’. The concept of intervention inherent to the right is wide-ranging, potentially involving a host of acts (e.g. sanctions to the coercive use of force). This is consistent with rights leaving their bearers discretion over the specific ways in which they exercise it. Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3 art 4 (h). (AU Constitutive Act).

<sup>2139</sup> Outcome Document (n 1772), para 139, emphasis added.

<sup>2140</sup> Outcome Document, *ibid*.

phrases suggest that the international community *can* discharge secondary RtoP but, at the same time, denote that the international community retains discretion over whether it *is* discharged in a particular case. These elements of the Outcome Document suggest that the international community may exercise a *right* to protect under secondary RtoP when it has the capacity and will to do so. However, this writer considers that characterising secondary RtoP as a *general* “right to protect” tends to undermine (i) that secondary RtoP interacts with existing treaty *obligations* (e.g. UNSC’s obligation to maintain international peace and security<sup>2142</sup>) and, therefore, that at least elements of secondary RtoP are stronger than a “right”; and (ii) the fact that, like duties, “rights” are also usually held by a specific bearer.<sup>2143</sup>

### 3.1.3 Responsibility to Protect

Assessments of secondary RtoP from the perspective of a *responsibility to protect*,<sup>2144</sup> take different approaches to the way in which ‘[t]he vocabulary of responsibility’<sup>2145</sup> works in the Outcome Document. Orford<sup>2146</sup> construes “responsibility” in the sense of a permissive rule, arguing that the Outcome Document uses ‘language for conferring authority and allocating powers rather than as a language for imposing binding obligations and commanding obedience’.<sup>2147</sup> The present author agrees that the Outcome Document (i) allocates *authority* to discharge secondary RtoP (i.e. through its references to peaceful responses being undertaken ‘through the United Nations’<sup>2148</sup>); (ii) allocates *powers* to discharge secondary RtoP (e.g. non-peaceful responses being undertaken ‘through the UNSC’,<sup>2149</sup> in accordance with their existing power to authorise enforcement measures under Chapter VII); (iii) did not impose ‘binding obligations’<sup>2150</sup> (e.g. it only “commits” the international community to

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<sup>2141</sup> Outcome Document, *ibid*.

<sup>2142</sup> UN Charter (n 1895) arts 24 (1) and 39.

<sup>2143</sup> For e.g. the right to intervene discussed above is conferred explicitly provides for ‘[t]he right of *the Union* to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity’, emphasis added. AU Constitutive Act (n 2138) art 4 (h).

<sup>2144</sup> This assessment has been undertaken by, for example: Orford, *International Authority and the Responsibility to Protect* (n 2125) 25-27; Strauss, “A Bird in the Hand is Worth Two in the Bush” (n 1773), 48; Payandeh (n 1990), 482-484 and 508-513; Welsh and Banda (n 1778), 216-220; Glanville, ‘The Responsibility to Protect Beyond Borders’ (n 2126), 18-19 and 27-30; Peters, ‘Humanity as the Alpha and Omega of Sovereignty’ (n 2013), 540; Bird (n 2125), 886-888 [on the specific issue of the way in which secondary RtoP can be grounded in the “duty to cooperate” inherent in the ILC Articles on State Responsibility] and Bruneau and Toope (n 2107), 74-77.

<sup>2145</sup> Orford, *ibid*, 25.

<sup>2146</sup> Orford, *ibid*.

<sup>2147</sup> She argues that we should instead evaluate its character as ‘a form of law that *confers powers* ‘of a public or official nature’ and that *allocates jurisdiction*’, emphasis added. H L A Hart, *The Concept of Law* (Clarendon Press, Oxford 1961) 28 and 32 cited in Orford, *ibid*, 25. Chesterman has supported Orford’s interpretation of the character of secondary RtoP as a permission to protect. See S Chesterman, ‘Leading from Behind: The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya’ (2011) 25 (3) *Ethics & International Affairs* 279, 282.

<sup>2148</sup> Outcome Document (n 1772), para 139.

<sup>2149</sup> Outcome Document, *ibid*.

<sup>2150</sup> Orford, *International Authority and the Responsibility to Protect*, (n 2125), 25.

provide assistance to States to help them to fulfil primary RtoP<sup>2151</sup>); and (iv) does not “command obedience”<sup>2152</sup> (i.e. it does not provide for consequences for a failure to discharge secondary RtoP).

However, this writer is not convinced by characterising the notion of “responsibility” inherent in secondary RtoP in the sense of merely a *permission to protect*.<sup>2153</sup> Examination of the approaches taken to secondary RtoP’s status in practice suggests that at least elements of secondary RtoP are stronger than this. There is some support for interpreting existing treaty provisions in light of secondary RtoP as a moral and/or political obligation to protect, especially the UNSC’s mandate to maintain international peace and security.<sup>2154</sup> Perhaps most significantly, contouring “responsibility” in the sense of permission tends to undermine that secondary RtoP also subsumes existing prohibitive obligations, not least the Charter prohibition on the use of armed force for human protection purposes which does not have the prior authorisation of the UNSC.<sup>2155</sup>

Glanville<sup>2156</sup> represents the second way in which “responsibility” is contoured in present literature, examining secondary RtoP’s character in the sense of a moral, political or legal responsibility.<sup>2157</sup> Glanville persuasively argues that secondary RtoP could amount to a general political responsibility because in practice relevant members of the international community have explained that they are undertaking certain actions for protective purposes and have provided reasons to justify a failure to take protective action.<sup>2158</sup> There is some support for this characterisation in practice. With respect to justifying action for protective reasons, the explicit reference to using armed force to ‘protect civilians’<sup>2159</sup> in Libya is a primary example. In relation to providing reasons to justify inaction, it is notable that Russia<sup>2160</sup> and China<sup>2161</sup> have sought to explain their decision to use the veto to block action in Syria. However, the argument that relevant actors may have a “political responsibility to protect” because they consider that they are required to provide a ‘reasonable justification for

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<sup>2151</sup> Outcome Document (n 1772), para 139.

<sup>2152</sup> Orford, *International Authority and the Responsibility to Protect*, (n 2125), 25.

<sup>2153</sup> Orford, *ibid*.

<sup>2154</sup> The primary example of support for this possibility is that a number of third States sponsored the draft Resolution for the approval of the Third Committee when Russia and China failed to discharge secondary RtoP, and their international peace and security, by blocking action in Syria. See UN Press Release, ‘Third Committee Approves Resolution Condemning Human Rights Violations in Syria’ (n 2009).

<sup>2155</sup> UN Charter (n 1895) art 2 (4). This was clear in the fact that UNSC authority was gained for the use of armed force in Libya. See also examples of State views affirming the requirement for UNSC authority to discharge secondary RtoP through the use of armed force (n 2064).

<sup>2156</sup> Glanville, “The International Community’s Responsibility to Protect” (n 2070).

<sup>2157</sup> Glanville, *ibid*, 192-196 [moral responsibility], 196-200 [legal responsibility] and 200-203 [political responsibility].

<sup>2158</sup> Glanville, *ibid*, 201-202.

<sup>2159</sup> UNSC Res 1973 (2011) (n 1786), para 4.

<sup>2160</sup> Statements of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Records (4 October 2011) UN Doc S/PV.6627, (4 February 2012) UN Doc S/PV.6711 and (19 July 2012) UN Doc S/PV.6810.

<sup>2161</sup> Statements of the Representative of *China* to the UNSC, UNSC Verbatim Records, *ibid*.



inaction',<sup>2162</sup> tends to lose its grounding when we recall Russia<sup>2163</sup> and China<sup>2164</sup> explained their use of the veto in order to *maintain* respect for Syria's sovereignty and the principle of non-interference in internal affairs, principles which secondary RtoP seeks to qualify and reconceptualise in light of human protection. In addition, whilst Glanville's assessment of secondary RtoP as a *moral responsibility* had the potential to bring a new insight into discussions over its character, his assessment tends to become less compelling when he conflated the notion of "responsibility" with traditional understandings of a "duty". To this effect, Glanville argues that the Outcome Document fails to confer secondary RtoP as a "responsibility" because it does not assign the responsibility to a specific bearer.<sup>2165</sup> Arguably, this tends to presume that a "responsibility" is subject to the same requirement as a binding "duty", namely the requirement for a readily identifiable bearer and not the wider concept of the "international community".<sup>2166</sup> Finally, Glanville's assessment of secondary RtoP as a "legal responsibility" highlights the difficulty that can arise when seeking to ground secondary RtoP's overall character in existing legal formulations of rules, such as the duty of third States to prevent genocide extraterritorially. As Glanville notes, the barrier to this assessment is that secondary RtoP falls upon an array of potential actors by being assigned to the broader "international community".<sup>2167</sup> There is therefore ambiguity over which actors would carry out the "legal responsibility" and, therefore, whether secondary RtoP can be borne as a "legal responsibility" at all.<sup>2168</sup>

The third way in which "responsibility" is delineated in present literature is in its traditional public international law of *accountability for an internationally wrongful act*. Several commentators<sup>2169</sup> have examined the way in which secondary RtoP can be grounded in the ILC Articles on State Responsibility. On the one hand, this assessment is useful. It helps to explain the interplay between a failure to fulfil primary RtoP and secondary RtoP's activation by recalling that the (i) RtoP framework entails obligations *erga omnes*, such as the duty to prevent genocide;<sup>2170</sup> and (ii) ILC Articles on State Responsibility provide that *erga omnes* obligations are owed to the international community as a whole.<sup>2171</sup> On the other

<sup>2162</sup> Glanville, "The International Community's Responsibility to Protect" (n 2070), 204.

<sup>2163</sup> See e.g. Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627.

<sup>2164</sup> See particularly, Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record, *ibid*.

<sup>2165</sup> Glanville, "The International Community's Responsibility to Protect" (n 2070), 195-196.

<sup>2166</sup> Cunliffe (n 1926), 55; Tan (n 2112), 95 and Welsh and Banda, (n 1778), 217-226.

<sup>2167</sup> Glanville, "The International Community's Responsibility to Protect" (n 2070), 199-200.

<sup>2168</sup> Glanville, *ibid*.

<sup>2169</sup> See especially, Payandeh (n 1990), 508-513; Stahn (n 1778), 115-120; Welsh and Banda (n 1778), 216-220; Glanville, 'The Responsibility to Protect Beyond Borders' (n 2126), 18-19 and 27-30; Peters, 'Humanity as the Alpha and Omega of Sovereignty' (n 2013), 540; Bird (n 2125), 886-888; Bruneau and Toope (n 2107), 74-77.

<sup>2170</sup> Payandeh, *ibid*, 510.

<sup>2171</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries' Yearbook of the International Law Commission Vol. 2, Part 2 (2001), 32-38.

hand, the ILC Articles do *not* address whether (i) there is a “positive duty of cooperation”<sup>2172</sup> to bring to an end serious breaches of erga omnes obligations; or (ii) States who are *not directly affected* by a breach of these obligations can apply countermeasures in response to the aforementioned type of violation.<sup>2173</sup> In both cases, the ILC Articles leave the issues as subject to the *further development* of international law.<sup>2174</sup> Difficulty is usually encountered when attempting to reconcile secondary RtoP with these aspects of the ILC Articles.

One example of this difficulty are the conclusions that Payandeh draws from her assessment of whether the RtoP Reports affirm that States who are not directly affected can apply countermeasures, as opposed to retorsions or claims for reparation.<sup>2175</sup> Although she acknowledges that the UNSG’s 2009 Report on Implementing RtoP ‘discusses sanctions only in the context of the UNSC’,<sup>2176</sup> Payandeh argues that the Report ‘nevertheless accentuates the importance of collective action outside the UN framework with regard to non-forcible measures’.<sup>2177</sup> The present author would argue that the difficulty with invoking this as authority for the possibility that secondary RtoP attempts to progressively develop the issue left open by the ILC is that it tends to overlook what States agreed to undertake at the Summit. Here, it should be recalled that the Outcome Document provides that:

‘The international community, *through the United Nations*, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity’.<sup>2178</sup>

As Payandeh herself recognises, the above Outcome Document provision isolates collective action to the UN.<sup>2179</sup> Accordingly, it seems somewhat tentative to argue that secondary RtoP may develop the law regarding the adoption of countermeasures by States which are not directly affected by the breach of erga omnes obligations.

### 3.2 The Character of Primary and Secondary RtoP: General Findings

The present author considers that the character of primary RtoP is relatively clear. Primary

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<sup>2172</sup> International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (3 August 2001) UN Doc A/56/83 art 41 (1) discussed in Stahn (n 1778), 115-116 and Bird (n 2125), 886-888. (ILC Articles on State Responsibility).

<sup>2173</sup> International Law Commission Articles, *ibid*, art 54 discussed in Payandeh (n 1990), 510-511.

<sup>2174</sup> ILC Articles, *ibid*, art 41 (1) discussed in Stahn (n 1778), 115-116 and ILC Articles, *ibid*, art 54 discussed in Payandeh, *ibid*.

<sup>2175</sup> Payandeh, *ibid*, 511-513.

<sup>2176</sup> Payandeh, *ibid*, 511-512.

<sup>2177</sup> Payandeh, *ibid*, 512.

<sup>2178</sup> Outcome Document (n 1772), para 139, emphasis added.

<sup>2179</sup> Payandeh, (n 1990), 512.

RtoP is conferred on a specific bearer<sup>2180</sup> and, furthermore, entails discretion not over whether *it is* implemented but only the specific means *by which* it is implemented.<sup>2181</sup> Primary RtoP therefore seems to largely overlap with the character of the existing *duties* of States that it subsumes.

In contrast, the above assessment of existing literature illustrates that secondary RtoP cannot be easily ascribed as a general duty, obligation, right or responsibility in its traditional forms. Unlike a general and binding duty, it is not assigned to a specific bearer<sup>2182</sup> and there are no consequences for a failure to enforce it.<sup>2183</sup> Secondary RtoP also lacks the precision of a “right” because it is not attached to any specific actor but the international community more generally. Furthermore, it seems to exceed a permissive responsibility because it also subsumes prohibitive obligations, not least the prohibition on the use of armed force which is not undertaken as part of a State’s right to self-defence or with the authorisation of the UNSC. This writer would argue that the overarching weakness in present literature flows from the fact that commentators are attempting to reconcile secondary RtoP’s character with traditional formulations (e.g. “duty”, “right”, “responsibility” in the sense of an internationally wrongful act). Arguably, the broader significance of secondary RtoP can be better appreciated by changing the point of reference of assessment from the *old* to the *new*.

### 3.2.1 A Way Forward? Secondary RtoP and the Emerging Notion of “Responsibility”

To this writer, secondary RtoP echoes the multi-faceted and heterogeneous character inherent in the novel notion of “responsibility” emerging in a business and human rights context.<sup>2184</sup> There is the duty to protect upon States under primary RtoP<sup>2185</sup> akin to States duty to protect human rights in the context of the business and human rights agenda.<sup>2186</sup> Like the understanding that businesses, via their “sphere of influence”,<sup>2187</sup> have a *moral and/or social responsibility* to *contribute* to protecting human rights in the course of their dealings, the international community has a *general moral and/or political responsibility* to undertake *what actions they can* to protect populations from RtoP crimes. Just as businesses “responsibility” is grounded in the *expectation* that they should take what actions they can to

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<sup>2180</sup> Outcome Document (n 1772), para 138.

<sup>2181</sup> Outcome Document, *ibid*.

<sup>2182</sup> Cunliffe (n 1926), 55; Tan (n 2112), 95; Welsh and Banda (n 1778), 217-226 and Glanville, “The International Community’s Responsibility to Protect” (n 2070), 295-297.

<sup>2183</sup> Alvarez, “The Schizophrenias of RtoP” (n 2127); Stahn (n 1778), 118 and Strauss, “A Bird in the Hand is Worth Two in the Bush” (n 1773), 53.

<sup>2184</sup> UNHRC, ‘Framework for Business and Human Rights (n 1787).

<sup>2185</sup> Outcome Document (n 1772), para 138.

<sup>2186</sup> UNHRC, ‘Framework for Business and Human Rights (n 1787), 9-14.

<sup>2187</sup> UNHRC, *ibid*, 19-20.

protect human rights,<sup>2188</sup> secondary RtoP *builds upon the expectations* that arose from the inaction of the international community in cases like Rwanda, setting down an expectation that international protective action (i) *should* (not must) be undertaken (e.g. through Chapter VI, VII and VIII of the UN Charter); and (ii) *should not* (not must) be prevented from being undertaken (e.g. by UNSC veto).

Arguably, characterising secondary RtoP in terms of this emerging notion of “responsibility” helps to address questions left unanswered in present literature. The reason for the failure to assign secondary RtoP to a specific bearer may simply be because there was *no intention* to formulate it as a binding duty. Instead, the intent may have been to codify secondary RtoP as a general ‘global standard’<sup>2189</sup> of the ‘expected conduct’<sup>2190</sup> of each of member of the international community. For example that the UNSC *should* recognise RtoP crimes to represent threats to international peace and security, authorise Chapter VII enforcement measures when necessary.

Furthermore, it may be unnecessary to examine whether secondary RtoP does, by reason of not *explicitly excluding* individual States from applying countermeasures,<sup>2191</sup> reflect and/or progress the traditional understanding of “responsibility” as accountability for an internationally wrongful act. It may be better to simply acknowledge that the general consensus is that the role of individual States is limited to acting through the UN or regional organisations and, therefore, that secondary RtoP seeks to codify the expectation of what third States *should do* in the event of RtoP crimes, not as an attempt to *progress* the law in relation to what actions third States may take to address an internationally wrongful act which they are not directly affected by.<sup>2192</sup>

It is perhaps unsurprising that the RtoP framework can be characterised in a similar way to that of business and human rights. Both frameworks were an attempt to map out a consensus over similar tensions. It would have been controversial to try to suggest that businesses have somehow acquired a binding duty to protect human rights, just as it would have been highly contentious to ask the international community to accept that it must act (including by authorising Chapter VII enforcement measures) in every case of RtoP crimes. Neither “duty” has any basis in existing international law. What both frameworks *have* achieved is (i) *explicitly codifying* that it is *not only States* who are in a position to protect

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<sup>2188</sup> UNSG’s Special Representative on Business and Human Rights, ‘The UN “Protect, Respect and Remedy” Framework for Business and Human Rights’ (September 2010), 2 <<http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf>> accessed 11 February 2012 and UNHRC, *ibid*, 8.

<sup>2189</sup> UNSG’s Special Representative on Business and Human Rights, *ibid*.

<sup>2190</sup> UNSG’s Special Representative on Business and Human Rights, *ibid*.

<sup>2191</sup> Stahn (n 1778), 119.

<sup>2192</sup> Either in terms of progressing (i) the nature of the “duty of cooperation” under Article 41 (1), International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (2001) see Stahn, *ibid*, 115-116 or (ii) States who are not directly affected by the breach at issue undertaking countermeasures in the collective interest provision in Article 54, International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (2001) (see Payandeh (n 1990), 510-511).

human rights; (ii) *identifying* the broader range of actors *who are* in a position to do so (e.g. businesses,<sup>2193</sup> regional organisations,<sup>2194</sup> UNSC<sup>2195</sup>); and (iii) *expressly providing* that this respective range of actors *should* use the measures *at their disposal* in order to achieve this (e.g. workplace policies,<sup>2196</sup> complaint mechanisms,<sup>2197</sup> / Chapters VI,<sup>2198</sup> VII<sup>2199</sup> and VIII<sup>2200</sup> of the UN Charter).

## Conclusion

This chapter began by noting that no State intended to create primary and secondary RtoP as new legal obligations at the Summit. The chapter therefore examined whether primary and secondary RtoP (i) entail legally binding elements; (ii) have become new customary international law in subsequent practice; (iii) create new interpretations to existing treaty obligations; or (iv) are effective as soft law.

The chapter noted that whilst primary and secondary RtoP have been discharged in State practice, there is no evidence to suggest that States or the international community consider that they are legally obligated to do so. Furthermore, an implicit theme throughout the chapter is that there is rarely an express statement that protective measures are being applied in order to implement primary and secondary RtoP. Although this may not be significant with regard to the actual implementation of the measures,<sup>2201</sup> it can be legally significant because it suggests that the legal authority of their application is considered to be the existing instruments to which primary and secondary RtoP relate. Accordingly, at the time of writing, there is no evidence of *opinio juris* on which to argue that either has become *new* customary international law.

However, there is evidence that primary and secondary RtoP subsume a wide variety of legal duties and obligations and, therefore, that each entail at least legally binding elements. In terms of primary RtoP, these include States duties to (i) prevent genocide;<sup>2202</sup> (ii) respect,

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<sup>2193</sup> UNHRC, 'Framework for Business and Human Rights (n 1787), 14.

<sup>2194</sup> Outcome Document (n 1772), para 139.

<sup>2195</sup> Outcome Document, *ibid*.

<sup>2196</sup> UNHRC, 'Framework for Business and Human Rights (n 1787), 15 and 17.

<sup>2197</sup> UNHRC, *ibid*, 24-25.

<sup>2198</sup> Outcome Document (n 1772), para 139.

<sup>2199</sup> Outcome Document, *ibid*.

<sup>2200</sup> Outcome Document, *ibid*.

<sup>2201</sup> This was a point made by the UN Special Adviser on RtoP. E C Luck, 'The Normative Journey: The Evolution of the RtoP Concept' (Keynote address at the European Science Foundation Conference 'The Responsibility to Protect from Principle to Practice', Linköping, Sweden, 9 June 2010).

<sup>2202</sup> Genocide Convention (n 1924) art 1. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 221, para 430.

protect and fulfil human rights,<sup>2203</sup> and (iii) permit access to humanitarian agencies and personnel.<sup>2204</sup> In relation to secondary RtoP, these include (i) calling upon ‘competent organs’<sup>2205</sup> of the UN to take ‘appropriate measures’<sup>2206</sup> to prevent genocide; (ii) the UNSC’s obligation to maintain international peace and security;<sup>2207</sup> (iii) the UNGA’s residual obligation to maintain peace and security;<sup>2208</sup> and (iv) the obligation to refrain from the use of armed force which is not carried out in self-defence or with the prior authorisation of the UNSC.<sup>2209</sup>

Consideration was also given to whether there is support for reinterpreting existing treaty obligations in light of primary and secondary RtoP. With regard to primary RtoP, the present author outlined that there is growing support for reinterpreting the consequences of a State’s breach of, for example, its human rights treaty obligations. State practice has moved beyond holding States accountable for such breaches in treaty monitoring bodies and, instead, toward these breaches activating secondary RtoP. This provides new ways of promoting and ensuring State compliance with their treaty obligations. In relation to secondary RtoP, it was suggested that there is growing support for reinterpreting the UNSC’s obligation to maintain peace and security in light of a moral and/or political responsibility of the international community to protect populations from RtoP crimes. Furthermore, the Outcome Document succeeded in codifying that RtoP crimes inside a State can be interpreted as threats to international peace and security which activate Chapter VII enforcement measures.<sup>2210</sup> However, practice affirms that whether this interpretation is utilised in RtoP cases remains at the UNSC’s discretion. Significantly, practice suggests some support for reinterpreting the prohibition on armed force under treaty and customary international law. Whilst there is no support for secondary RtoP legalising the unilateral or unauthorised armed force for human protection purposes, the Outcome Document does seem to recognise that armed force can be

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<sup>2203</sup> On the scope of States human rights duties, see generally UN Human Rights Committee, ‘General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13. For a useful overview of the legal codification of the rights to life and non-discrimination, see respectively UN Human Rights Committee, ‘General Comment No. 6: The Right to Life [Article 6]’ (30 April 1982) and UN Human Rights Committee, ‘General Comment No. 18: Non-Discrimination’ (10 November 1989).

<sup>2204</sup> This is generally considered to have become customary international law. It also finds reflection in treaty law, for e.g. in Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Geneva (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 art 23. On the entrenchment of this in treaty and customary international law see generally, International Committee of the Red Cross, ‘Access for Humanitarian Relief to Civilians’ <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule55#Fn1](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55#Fn1)> accessed 10 March 2012.

<sup>2205</sup> Genocide Convention (n 1924) art 8.

<sup>2206</sup> Genocide Convention, *ibid*.

<sup>2207</sup> UN Charter (n 1895) art 39.

<sup>2208</sup> UN Charter, *ibid* art 42.

<sup>2209</sup> UN Charter, *ibid*.

<sup>2210</sup> Peters, ‘Humanity as the Alpha and Omega of Sovereignty’ (n 2013), 538-539; Slaughter (n 2080), 626-627; Payandeh, (n 1990), 494-497 and, further, Schott (n 2080), 24-80.

applied for this purpose,<sup>2211</sup> as do State responses to the Russia-Georgia conflict<sup>2212</sup> and Libya.<sup>2213</sup> Accordingly, secondary RtoP seems to codify that using UNSC authorised armed force for human protection purposes is both legitimate and legal.

This relates to a further theme in the chapter, namely that whilst neither primary nor secondary RtoP create new legal obligations, they add value by putting existing legal obligations into a new moral and political framework. It was noted that this is States general understanding of the status of both responsibilities and, therefore, that the Outcome Document is largely understood as a *soft law* instrument.<sup>2214</sup> This can be effective by urging the enforcement of the existing legal framework and promoting new ways of ensuring States protect their populations. Conversely, it could entail implications, not least *legitimising illegal* actions which are undertaken to protect populations from RtoP crimes (e.g. unauthorised armed force in the event of UNSC inaction). The fact that illegal actions may still need to be undertaken suggests that secondary RtoP has not yet fully resolved the legality vs. legitimacy debate.<sup>2215</sup>

The chapter also argued that, whilst secondary RtoP clearly confers permission upon the international community to protect populations, its overlap with existing obligations suggests that it may be injudicious to argue that it merely *permits* certain protective actions to be undertaken.<sup>2216</sup> Furthermore, fundamental aspects of secondary RtoP inhibit it from being fully characterised as a general duty or right to protect or simply State responsibility for an internationally wrongful act. To this writer, it is perhaps more appropriate to explain the RtoP framework as *heterogeneous* and *multifaceted* both in terms of (i) the status of its required/proposed actions that it incorporates (e.g. legal duties, obligations, moral/political responsibilities); and (ii) the general character of its components (e.g. duty of the State under primary RtoP, responsibility of the international community under secondary RtoP). RtoP's heterogeneity is presently looked upon as an impediment because it undermines the capacity for either primary RtoP, secondary RtoP or the RtoP framework to become new customary international law *in general*.<sup>2217</sup> Although this is a persuasive argument, this writer would

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<sup>2211</sup> Outcome Document (n 1772), para 139. This was, at least, Malaysia's summary of the key outcome of the World Summit. Statement of the Representative of *Malaysia* to the UNGA, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.4.

<sup>2212</sup> See particularly, Statements of the Representatives of *Belgium*, the *United States* and *United Kingdom* to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5952.

<sup>2213</sup> See particularly: Statements of the Representatives of the *United States*, *United Kingdom*, *Lebanon*, *Bosnia and Herzegovina*, *Colombia* and *South Africa* to the UNSC, UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498. See also, UNSC Res 1973 (2011) (n 1786).

<sup>2214</sup> Strauss, "A Bird in the Hand is Worth Two in the Bush" (n 1773), 25-57; Welsh and Banda (n 1778); Stahn (n 1778) and Shaffer and Pollack, 'Hard Versus Soft Law in International Security' (n 1778), 1232.

<sup>2215</sup> ICISS, *The Responsibility to Protect* (n 2068), 1-9.

<sup>2216</sup> Orford, *International Authority and the Responsibility to Protect*, (n 2125), 25-26.

<sup>2217</sup> Payandeh (n 1990), 482 [arguing that '[t]he responsibility to protect is constructed as a comprehensive framework for the prevention and containment of massive human rights violations. As such it cannot in its entirety become a legal norm. Single elements of the concept possibly could be translated into single rights and duties. But that does not make the concept as such a suitable candidate for a legal norm'].

argue that the legal value and broader significance of the heterogeneity of the RtoP framework merits closer reflection in future research. The RtoP framework utilises the concept of “responsibility” in a multifaceted way, in a manner akin to the notion of “responsibility” used in the business and human rights context.<sup>2218</sup> Both frameworks (i) expand the concept of the bearer of the “obligations” that they entail; (ii) contain legal duties and moral/political responsibilities; and (iii) use the dichotomy of duty/responsibility to explain why States *must* undertake actions to protect human rights, and why a range of wider actors *should* take a range of actions to contribute to the fulfilment of the obligations borne by the State. If we accept this account of the RtoP framework, there is scope to argue that the framework has a wider bearing on international law, specifically by clarifying that responsibility can entail a wider meaning than simply accountability for an internationally wrongful act. The Outcome Document is therefore remarkable, irrespective of its legal status, because it successfully formulated a novel “responsibility” to protect in the face of immense political challenge.

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<sup>2218</sup> UNHRC, ‘Framework for Business and Human Rights (n 1787).



## CHAPTER VII

### RtoP's SCOPE, VIABILITY AND VALUE ADDED RESEARCH RESULTS AND RECOMMENDATIONS

#### Introduction

Bonhoeffer stated that “action springs not from thought, but from a readiness for responsibility”. On the one hand, the actions undertaken to mobilise RtoP between 2005 and 2012 suggest that there is a widespread readiness for a “responsibility to protect”. In late 2008, when work on this thesis began, it was considered remarkable that RtoP had its own Wikipedia page.<sup>2219</sup> Four years later and RtoP has been explicitly referred to at the highest levels of international politics, is the subject of annual thematic UN General Assembly [UNGA] debates and the daily focus of an increasing body of national advisers. Perhaps most significantly, RtoP has now been invoked in an expanse of country-specific practice. Conversely, the failure to take effective action in Syria suggests that we may be some way from widespread readiness for the “responsibility to protect”.

This chapter utilises the preceding chapter findings to outline what the competing nature of practice to date suggests about RtoP's current scope, viability and value added. The chapter considers some of the steps which may be taken in future practice to strengthen readiness for RtoP. The chapter concludes with a comment on RtoP's development over the research period and the possibility that, for the immediate future at least, international attention may be less about “RtoP” and more “PtR” – Protecting the Responsibility.

#### 1 The ‘Narrow’ but ‘Deep’<sup>2220</sup> Nature of the RtoP Framework

Relevant practice sustains the UN Secretary-General's depiction of RtoP as ‘narrow’<sup>2221</sup> in terms of the harmful acts to which it applies and ‘deep’<sup>2222</sup> in relation to its capacity to be discharged through a broad range of measures. However, practice also suggests that “narrow” and “deep” may appropriately summate other aspects of RtoP. A recurrent theme

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<sup>2219</sup> C Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (2007) 101 (1) AJIL 99, 100.

<sup>2220</sup> Report of the UNSG, ‘Implementing the Responsibility to Protect’ (12 January 2009) UN Doc A/63/677, 8 (Report of the UNSG, Implementing RtoP).

<sup>2221</sup> *ibid*, 8.

<sup>2222</sup> *ibid*, 8.

throughout the substantive chapters is that components of RtoP are “broad” in the sense that they can be *tapered to the specific situation at hand*. Examples include (i) the fact that who bears primary RtoP bearer in non-“State” territories may vary in accordance with the factual situation at hand; (ii) the specific means which are used to discharge primary RtoP can legitimately vary from State to State; and (iii) that in cases which, for example, involve an armed insurrection against the government implicated in the original perpetration of RtoP crimes, the recipient of assistance may not be the State’s national authorities.

Furthermore, the substantive chapters illustrate that *decision making* regarding RtoP and RtoP’s *substance* both entail depths which are not explicitly acknowledged by relevant actors, such as the UNSG. At a decision-making level, practice suggests that a range of additional considerations can influence whether secondary RtoP is discharged, or discharged through a particular measure. These deeper layers to decision making include issues like which actor inside a State has the requisite legitimacy to receive assistance, whether the potential RtoP beneficiaries overlap with the protected person of the RtoP crime apprehended and whether the human rights violations at issue are of the requisite character, gravity and scale to warrant secondary RtoP’s application. At a substantive level, there is a second layer to relevant practice which defines the more intricate aspects of primary and secondary RtoP’s discharge, thereby deepening the scope of discharge strategies. Notably, this layer of practice includes consideration of issues like whether State consent to assistance or the UNSC’s application of Chapter VII measures can be induced, coerced or (in the case of the UNSC) entirely bypassed and, furthermore, which human rights bear particular relevance to the prevention of RtoP crimes in the State.

## **2 RtoP’s Relationship with Existing Obligations/Practice is Multifaceted**

Various components of RtoP interconnect with an assortment of existing obligations, including (i) the duty bearer concept, duration and character of States existing human rights obligations; (ii) international criminal law, including elements of the mass atrocity crimes to which RtoP relates, the concept of individual criminal responsibility and the deterrent/reactive value thereof; (iii) relevant principles of international humanitarian law, including Occupying Powers duty to respect international humanitarian law in territories under their Occupation; (iv) the prohibition on the use of armed force and Chapters VI, VII and VIII of the UN Charter; and (v) the international community’s role in minority protection, development assistance and conflict prevention. To this writer, RtoP’s relationship can be summated as *multifaceted* and that which entails *five dimensions*.

First, there is often a *persuasive rationale* for why the RtoP framework subsumes, or is influenced by, relevant existing obligations/practice. The table displays some examples of the way in which various components of the RtoP framework replicate existing obligations/practice and the persuasive rationale which underscores this overlap:

Table (D): Examples of the Persuasive Rationale which underscores the Overlap between various components of RtoP and Existing Obligations/Practice

RtoP Component	Existing Obligation/Practice	Persuasive Rationale
Primary RtoP Bearer Concept [“States” and “National Authorities”]	Existing human rights law obligations are owed by <i>all</i> aspects of States’ governments in their territory or territories under their <i>effective control</i> .	Helps: To ensure that primary RtoP does not weaken the State-Centric concept of existing human rights obligations; and Uphold the understanding that human rights obligations are owed by State actors to those residing in their territory or territories under their effective control.
The “International Community” is an Umbrella Term for who can Discharge Secondary RtoP, not a “Bearer” Concept.	The way in which the “international community” is used in the context of State Responsibility and Minority Protection as shorthand for the range of actors who hold a vested interest in States’ performance of certain actions.	Helps to ground secondary RtoP in the existing international legal and political framework by linking <i>who</i> can discharge secondary RtoP, and <i>when</i> they can discharge secondary RtoP, to pre-existing mandates. For example, secondary RtoP may be discharged in a non-peaceful manner by the Security Council when the situation represents a threat to international peace and security and, therefore, warrants the application of Chapter VII enforcement measures).
The Ongoing Nature of Primary RtoP’s Duration	The enduring nature of States’ existing human rights law obligations.	Ensures that primary RtoP does <i>not</i> weaken States’ existing human rights obligations by rendering them as obsolete when Secondary RtoP is being discharged.
The Consensual Nature of Secondary RtoP’s Assistance Component	The principle of host nation consent that is used in a number of existing contexts, including minority protection and peacekeeping missions.	Helps to link secondary RtoP’s assistance component with the fundamental policy reasons which underscore the principle of host nation consent, namely the maintenance of friendly relations between States.

Second, there may be some *points of departure* between RtoP and existing obligations/practice. On the one hand, some existing obligations/practice may be approached more *restrictively* in RtoP practice. This could create a tension between our understanding of certain existing obligations/practice (i) generally (i.e. in non-RtoP contexts); and (ii) in the RtoP framework. One aspect of RtoP which could create this tension is its unsettled beneficiary concept. As chapter two outlined, States’ competing explanations of RtoP beneficiaries contradict the protected persons of some of the established human rights and criminal law mechanisms to which RtoP relates, specifically (i) the fact that existing

international criminal and humanitarian law instruments provide some protection from war crimes to persons actively participating in hostilities (i.e. persons who do not have civilians status),<sup>2223</sup> (ii) that the overwhelming majority of human rights protect *individuals*, not merely those with formal citizenship of the State, civilians status or a recognised right to self-determination; and (iii) similarly, relevant humanitarian and criminal law instruments do not qualify protection from mass atrocity crimes to the victim having formal citizenship of the State at issue. Thus, if the aforementioned beneficiary concepts were to take hold in future practice a conflict could arise between the protected person concepts of relevant human rights, criminal and humanitarian instruments (i) generally, whereby the wider protected person concepts would be upheld; and (ii) under the RtoP framework, whereby protection may, at least in some cases/States, be limited to persons with citizenship, civilians status or a recognised right to self-determination. Another area in which such a tension could arise is the UNSC's general approach to the application of Chapter VII enforcement measures in non-RtoP and RtoP cases. The UNSC appear to apply Chapter VII measures incrementally in RtoP cases (e.g. diplomacy,<sup>2224</sup> sanctions,<sup>2225</sup> use of armed force<sup>2226</sup>), despite the fact that the UNSC can discharge these measures non-incrementally (e.g. *begin with* authorising armed force).<sup>2227</sup>

Conversely, existing obligations/practice may be approached *less restrictively* under the RtoP framework. The provision of military assistance in the context of disputed national election results in the Côte d'Ivoire,<sup>2228</sup> and practical assistance to the insurrectionist movements in Libya and Syria,<sup>2229</sup> are one illustration. Essentially, this practice raises important questions over whether secondary RtoP's assistance component can *always conform* to the principle of neutrality in civil wars, especially when civil war is triggered by the perpetration of RtoP crimes.

The points of departure are of *varying significance*. Some departures could be conducive to RtoP's application in practice. The fact that secondary RtoP's activation to date has not involved assessments of whether the mass atrocity crime apprehended is being perpetrated with the requisite *mens rea* is one illustration. By drawing upon only some legal elements of

<sup>2223</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 8 (2) (b) (xxvi)/(xi) and art 8 (2) (e) (vii)/(ix).

<sup>2224</sup> UN Press Release, 'UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Libya' (22 February 2011) <<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 27 July 2012.

<sup>2225</sup> UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, paras 9-21.

<sup>2226</sup> UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, paras 4-5.

<sup>2227</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 42.

<sup>2228</sup> Statement of the Representative of the Côte d'Ivoire to the UNSC, UNSC Verbatim Record (30 March 2011) UN Doc S/PV.6508. (Statement of the Côte d'Ivoire, March 2011).

<sup>2229</sup> See e.g. 'Libya: Russia Denies French Arms Drop to Libyan Rebels' (*BBC News*, 30 June 2011) <<http://www.bbc.co.uk/news/world-europe-13979632>> accessed 5 August 2011 and UK Foreign Commonwealth Office, 'UK Provides Equipment to the National Transitional Council in Libya' (30 June 2011) <<http://www.fco.gov.uk/en/news/latest-news/?view=PressS&id=624285882>> accessed 14 August 2011.

these crimes, secondary RtoP can be discharged before the harm at issue becomes a mass atrocity “crime” in its full legal sense. At other times, the points of departure could have legal, practical and/or policy implications. Providing for the UN Human Rights Council [UNHRC] to monitor States’ compliance with primary RtoP as a separate obligation in itself could raise concerns over primary RtoP corresponding with a collective “right” of populations to protection from RtoP crimes. The collective nature of this right may prompt concerns over RtoP’s interplay with group rights, particularly RtoP’s capacity to strengthen secessionist tendencies and therefore threaten State sovereignty and territorial integrity.

Third, the scope and significance of RtoP’s relationship with existing obligations/practice are *still evolving*. Practice to date interacts, sometimes implicitly, with additional existing obligations/practice. One example is the connection between recognition and legitimacy used in the European minority protection context<sup>2230</sup> and the way in which this is echoed in some third States’ recognition of the legitimate “national authorities”/assistance recipients in Libya and Syria.<sup>2231</sup> If this interaction is subsequently maintained then RtoP’s relationship with existing obligations/practice may be *strengthened*. Contrastingly, RtoP’s relationship with existing obligations/practice may be problematic in future practice. There is a general consensus that discharging secondary RtoP through the legal use of armed force requires the prior authorisation of the UNSC.<sup>2232</sup> However, in cases like Syria where the UNSC will not concede to the moral/political pull of secondary RtoP, then secondary RtoP’s connection to (i) the existing legal regime on armed force could become *weaker*; and (ii) the moral/political legitimacy of humanitarian intervention may become *stronger*.

Fourth, there is at least scope to argue that RtoP may influence the subsequent development of wider obligations. RtoP also appears to have had an *influential* effect on the way in which some obligations have been subsequently developed. Two illustrations can be given. First, RtoP’s codification was influential during discussions on the definition of the crime of aggression for inclusion in the Rome Statute.<sup>2233</sup> Some States<sup>2234</sup> voiced what Schabas terms the ‘RtoP argument’,<sup>2235</sup> contending that the definition should not extend to the use of armed force for genuine human protection purposes (i.e. the so-called “grey area”

<sup>2230</sup> European Community, ‘Declaration on the Recognition of New States of New States in Eastern Europe and in the Soviet Union’ (16 December 1991) reprinted in R Caplan, *Europe and the Recognition of New States in Yugoslavia* (CUP, Cambridge 2005) 187-188.

<sup>2231</sup> For examples, see chapter two.

<sup>2232</sup> For supportive State views and other practice, see chapter six.

<sup>2233</sup> On these negotiations, see generally C Kress, ‘The Kampala Compromise on the Crime of Aggression’ (2010) 8 *Journal of International Criminal Justice* 1179. See further, S Murphy, ‘Criminalising Humanitarian Intervention’ (2009) 41 *Case W. Res J. Intl’ L.* 341.

<sup>2234</sup> See e.g. Statement of the *Czech Republic* at the General Debate at the Review Conference of the Rome Statute of the International Criminal Court (June 2010) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 28 October 2012 (Statement of the Czech Republic ICC Review Conference).

<sup>2235</sup> W A Schabas, ‘Kampala Diary 9 June 2010’ (*The ICC Review Conference: 2010*, 9 June 2010) <<http://iccreviewconference.blogspot.co.uk/>> accessed 28 October 2012.

<sup>2236</sup> of collective security). Second, the present author considers that there is at least some scope to argue that the Outcome Document RtoP paragraphs may have had some bearing on the development of the parameters of States' duty to prevent genocide. It may be significant that, when outlining when a breach of the duty to prevent genocide could be said to arise, the ICJ employed the standard of manifest failure.<sup>2237</sup> Context is important here. To this end, it should be recalled that the ICJ judgment came two years *after* States accepted R2P and following its citation in oral argument by counsel.<sup>2238</sup> However, we must bear in mind that the ICJ did not explicitly refer to RtoP or the Outcome Document in the judgment and, therefore, it cannot be said with certainty that the Court was influenced by this activating threshold.

Finally, the various components of RtoP cannot be merely ascribed to a restatement of existing obligations/practice because the substantive chapters consistently outline that the components do, or could evolve to, represent *value added*. This merits discussion in its own right.

### 3 RtoP can add Value to Existing Obligations/Practice in Four Ways

The various components of RtoP can or could represent value added to existing obligations/practice in *four ways*. First, various components of RtoP add *specificity* to relevant existing obligations/practice. In terms of obligations, primary RtoP has a similar utility to treaties which clarify what the particular requirements of general treaties are in a specific context, such as the Convention on the Elimination of Discrimination against Women, by helping to explain the requirements of discharging the rights/obligation inherent in general instruments in specific RtoP contexts. In relation to practice, secondary RtoP adds value to humanitarian intervention because its activating threshold is less ambiguous. Unlike the uncertainty which surrounded what nature, gravity and scale human rights violations

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<sup>2236</sup> Kress (n 2233), 1207.

<sup>2237</sup> The Court stated: '[I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State *manifestly failed* to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide', emphasis added. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, 221 para 430.

<sup>2238</sup> Oral Response of Counsel behalf of the Respondent in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 7 March 2006, 8-9 <<http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=91&code=bhy&p3=2>> accessed 28 October 2012.

should entail to warrant humanitarian intervention,<sup>2239</sup> examination of relevant practice suggests that the nature, character and scope of secondary RtoP's activation is relatively precise. Whilst the legally defined mass atrocity crimes to which secondary RtoP relates can be drawn upon with respect to the kind of acts which warrant its application, terms like "populations"<sup>2240</sup> can be drawn upon to determine the scale of the harm required for its activation.

Second, elements of RtoP are *novel* at a *substantive, enforcement and/or policy* level either because RtoP has (i) *itself* established a novel approach/mechanism to protection issues; or (ii) succeeded in *codifying* a protective approach/mechanism which was recommended in earlier practice. Examples of the former include (i) the possibility that primary RtoP may entail a collective right of populations to protection and the way in which it encourages new interpretations of States existing treaty obligations by promoting novel ways of holding States accountable for breaches thereof; and (ii) the establishment of RtoP specific actors, such as national RtoP advisers.<sup>2241</sup> Examples of the latter include the way in which (i) establishing an early warning system for RtoP crimes gives effect to relevant actors' recommendation for such a system to be established in order to target harmful acts which may threaten minority groups;<sup>2242</sup> and (ii) segregating the tipping points for the activation of secondary RtoP's assistance, peaceful and non-peaceful components codifies the notion of State "sovereignty as responsibility"<sup>2243</sup> by denoting, albeit implicitly, the varying stages at which States' are willing to accept that the international community can legitimately interfere in their internal affairs.

Third, aspects of RtoP add value by *strengthening existing* obligations/practice. Secondary RtoP bolsters third States' duty to prevent genocide through appropriate measures by encouraging relevant actors to apply assistance, peaceful and non-peaceful measures in order to protect populations' *from* RtoP crimes.<sup>2244</sup> Furthermore, the heterogeneous character

<sup>2239</sup> On this see e.g. G Evans, 'From Humanitarian Intervention to the Responsibility to Protect' (2006-2007) 24 Wis. Int'l L.J. 703, 707.

<sup>2240</sup> UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, paras 138-139. (Outcome Document).

<sup>2241</sup> See e.g. Joint Press Statement by the Ministers of Foreign Affairs of Ghana and Denmark (27 September 2010) <<http://www.um.dk/da/service/menu/Nyheder/ForsideNyheder/PRESSEMEDDELELSE>> accessed 23 October 2012 (Joint Press Statement by Ghana and Denmark) and Joint Press Release by the Governments of Australia, Costa Rica, Denmark and Ghana regarding Second Annual Meeting of the Network of National RtoP Focal Points (29 September 2012) <<http://us4.campaign-archive2.com/?u=1fbfaa1c8b7e823de28eb944d&id=d1a7ca889c&e=c591ff507e>> accessed 27 October 2012 (Joint Press Release by Australia, Costa Rica, Denmark and Ghana).

<sup>2242</sup> UN Human Rights Commission, 'Specific Groups and Individuals: Minorities. Report of the Independent Expert on Minority Issues' (6 January 2006) UN Doc E/CN.4/2006/74, 18.

<sup>2243</sup> International Commission on Intervention and State Sovereignty, *Responsibility to Protect* (International Development Research Centre, Ottawa 2001) 28.

<sup>2244</sup> For a similar view, see e.g. A Bellamy, S E Davies and L Glanville (eds), *The Responsibility to Protect and International Law* (Martinus Nijhoff, Leiden 2011) 98.

of the RtoP framework tends to reinforce the novel notion of “responsibility” emerging in the business and human rights context.<sup>2245</sup>

Finally, RtoP has an *expansive effect* on existing obligations/practice. For example (i) primary RtoP broadens the reach of traditionally “State party”/“State-owed” obligations to non-State parties<sup>2246</sup> and the international community<sup>2247</sup>, albeit not in the sense of new legally binding obligations; and (ii) secondary RtoP (implicitly) expands the concept of imminence from guiding the use of armed force for self-defence purposes to guiding the activation of secondary RtoP’s assistance, peaceful and non-peaceful components.<sup>2248</sup>

## 4 Efforts to make RtoP more Politically Palatable are of Varying Significance and Effectiveness

The potential substantive, legal and policy impediments to RtoP’s effectiveness were outlined throughout the substantive chapters. Essentially, what comes through is that several steps have been taken to make RtoP more politically palatable to States and other relevant actors, such as regional organisations. It is equally clear that these steps are of varying significance and effectiveness.

### 4.1 Effect One: Weaken RtoP’s Capacity to Protect *All Populations*

Practice illustrates that secondary RtoP was not formulated, and has not evolved, as a binding duty of the international community to protect *all populations* from RtoP crimes. The Outcome Document’s provision for the UNSC to consider the application of non-peaceful measures on a ‘case-by-case basis’<sup>2249</sup> enables a whole host of factors to be legitimately taken into account in the decision making process, including the impact which the application of such measures could have upon the political interests of a UNSC member. Significantly, the provision also reinforces the UNSC’s discretion over whether or not to recognise a situation as a threat to international peace and security and the permissibility of

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<sup>2245</sup> UNHRC, Protect, Respect, Remedy: A Framework for Business and Human Rights’ (7 April 2008) UN Doc A/HRC/8/5. (UNHRC, ‘A Framework for Business and Human Rights’).

<sup>2246</sup> For e.g. Kenya and the Genocide Convention. UN Treaty Series, ‘Status of the Convention on the Prevention and Punishment of the Crime of Genocide 1948’

<[http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-1&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&lang=en)> accessed 16 June 2012.

<sup>2247</sup> For e.g. chapter four referred to the way in which the international community’s cooperation with States in ethnic conflict initiatives has evolved to the international community owing its own responsibility to protect populations from RtoP crimes. H Nasic, ‘Minority Rights Instruments and Mechanisms: Minority Protection Along the Conflict Continuum’ (2007) EURAC Research: European Academy, 40 and Stahn (n 2219), 115.

<sup>2248</sup> Report of the High Level Panel on Threats, Challenges and Change, ‘A More Secure World: Our Shared Responsibility’ (2004) UN Doc A/59/562, 64 and 65.

<sup>2249</sup> Outcome Document (n 2240) para 139.



UNSC action being blocked by the P5 veto.<sup>2250</sup> These steps weaken RtoP's capacity to protect *all* populations from RtoP crimes because they make secondary RtoP's discharge dependent on political will, enabling States and relevant organisations to vary the approaches which they take to RtoP in accordance with whether RtoP's role in a *particular situation* or *thematic area* will undermine or strengthen broader political interests. Russia's handling of RtoP is perhaps the strongest example of this. During the drafting of the Outcome Document, Russia stressed the potential for RtoP to be invoked contrary to the fundamental principles of the UN Charter.<sup>2251</sup> Less than three years later Russia invoked RtoP to justify its use of unilateral and unauthorised armed force against Georgia to 'protect Russia citizens'<sup>2252</sup> in South Ossetia, thereby abusing RtoP in the very way which Russia feared other States' may do. Four years later in the context of UNSC debate on its ally (Syria), Russia has reiterated the importance of non-interference in internal affairs and urging the international community to avoid using RtoP to standardise international responses to RtoP crimes.<sup>2253</sup>

In short, not formulating secondary RtoP as a binding duty enables States to adopt a "cherry picking" approach to RtoP and to continue to live up to the phrase coined by Hedley Bull, namely that States are predominately uninterested in 'purposes beyond themselves'.<sup>2254</sup> However, this does not mean that secondary RtoP is entirely ineffective. Primarily, not pushing for secondary RtoP to be formulated as a binding duty to protect at the World Summit helped secondary RtoP appear less threatening to States' own interests, not least the UNSC P5. Arguably, this may also underscore why it is becoming increasingly difficult to identify a State which can be fully classified as an 'RtoP rejectionist'.<sup>2255</sup> For example, although Cuba recommended the deletion of the Outcome Document's RtoP paragraphs,<sup>2256</sup> it joined in the consensus adoption of the 2009 UNGA Resolution on RtoP.<sup>2257</sup> Indeed, the

<sup>2250</sup> See respectively, UN Charter (n 2227) art 39 and art 27 (3).

<sup>2251</sup> Statement of *Russia* to the UNGA, High-Level Meeting of the Plenary', (21 June 2005)

<[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 7 August 2012.

<sup>2252</sup> "Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC" (*Ministry of Foreign Affairs of the Russian Federation*, Moscow, 9 August 2008)

<[www.in.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/f87a3fb7a7f669ebc32574a100262597?OpenDocument](http://www.in.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/f87a3fb7a7f669ebc32574a100262597?OpenDocument)> accessed 11 May 2012 and Statement of the *Russian Federation* to the UNSC, UNSC Verbatim Record (8 August 2008) UN Doc S.PV.5952.

<sup>2253</sup> See respectively, Statement of *Russia* to the UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627 and Statement of *Russia* to the UNSC, UNSC Verbatim Record (25 June 2012) UN Doc S/PV.6790.

<sup>2254</sup> H Bull, *Justice in International Relations* (University of Waterloo Press, 1993) 13 cited in G Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings, Washington D.C. 2008) 39.

<sup>2255</sup> J Claes, 'Protecting Civilians from Mass Atrocities: Meeting the Challenge of R2P Rejectionism' (2012) 4 (1) GRtoP 67.

<sup>2256</sup> Representative of *Cuba* to the UNGA, 'Amendments Proposed by the Cuban Delegation to the Second Revised Draft Outcome of the HLP of the General Assembly of September 2005 (A/59/HLP/CRP.1/Rev.2)' (August 2005) <[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 12 September 2011.

<sup>2257</sup> Statement of the Representative of *Cuba* to the UNGA, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105.

only State position on RtoP which the present author cannot readily ascertain any evolution in is Zimbabwe because, aside from its condemnatory comments on RtoP at the World Summit,<sup>2258</sup> it has not explicitly remarked upon RtoP in relevant UN debates. Moreover, we need to focus on what RtoP is and not ‘what we would like it to be’.<sup>2259</sup> Secondary RtoP entails utility as a heterogeneous responsibility which, through its moral, political and legal elements, echoes the novel notion of “responsibility” emerging in a business and human rights context.<sup>2260</sup> Specifically, secondary RtoP props up the more mandatory character of the primary RtoP duty with the expectation that international protective action (i) *should* (not must) be undertaken; and (ii) *should not* (as opposed to must not) be prevented from being undertaken (e.g. by using the veto). As morally objectionable as it may be, the UNSC’s failure to act in a ‘timely and decisive’<sup>2261</sup> manner in Syria is consistent with the largely discretionary character of secondary RtoP. Accordingly, Syria is more an illustration of secondary “RtoP in practice” than a case which represents ‘RIP for RtoP’.<sup>2262</sup>

#### 4.2 Effect Two: Build Broad Based Political Support for RtoP

Political support for RtoP clearly extends beyond States which promoted the concept of humanitarian intervention (e.g. US, UK, France) and which have historical experience of RtoP crimes (e.g. Rwanda). Supportive positions on RtoP have been taken by States from across the geopolitical spectrum, including the Czech Republic,<sup>2263</sup> Hungary,<sup>2264</sup> Andorra,<sup>2265</sup> Monaco,<sup>2266</sup> Swaziland<sup>2267</sup> and Trinidad and Tobago.<sup>2268</sup> State views and country-specific/thematic practice illustrate that the broad based political support which RtoP has

<sup>2258</sup> Zimbabwe denounced RtoP’s incorporation in the Outcome Document, arguing that RtoP was a ‘vague concept’ which repackaged humanitarian intervention. Statement of the Representative of *Zimbabwe*, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.4.

<sup>2259</sup> E C Luck, ‘The Normative Journey: The Evolution of the R2P Concept’ (Keynote address at the European Science Foundation Conference: The Responsibility to Protect from Principle to Practice, Linköping, Sweden, 9 June 2010).

<sup>2260</sup> UNHRC, ‘A Framework for Business and Human Rights’ (n 2245).

<sup>2261</sup> Outcome Document (n 2240) para 139.

<sup>2262</sup> S M Patrick, ‘RIP for R2P? Syria and the Dilemmas of Humanitarian Intervention’ (*Council on Foreign Relations*, 12 June 2012) <<http://blogs.cfr.org/patrick/2012/06/12/rip-for-r2p-syria-and-the-dilemmas-of-humanitarian-intervention/>> last accessed 10 July 2012.

<sup>2263</sup> Statement of the Representative of the *Czech Republic* to the UNGA, ‘Thematic Debate on the Role of Regional Organisations in the Implementation of the Responsibility to Protect’ (12 July 2011) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 16 June 2012. (Statement of the Czech Republic 2011 RtoP Thematic Debate).

<sup>2264</sup> Statement of the Representative of *Hungary* to UNGA in UN Press Release, ‘More than 40 Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (24 July 2009) UN Doc GA/10849.

<sup>2265</sup> Statement of the Representative of *Andorra* in UN Press Release, *ibid.*

<sup>2266</sup> Statement of the Representative of *Monaco* in UN Press Release, *ibid.* (Statement of Monaco, 2009 RtoP Thematic Debate).

<sup>2267</sup> Statement of the Representative of *Swaziland* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100. (Statement of Swaziland).

<sup>2268</sup> Statement of the Representative of *Trinidad and Tobago* in ‘Opening of the Sixty First Session of the UN General Assembly’ (27 September 2006) <<http://www.un.org/webcast/ga/61/index.shtml>> accessed 14 October 2012. (Statement of Trinidad and Tobago).

acquired is directly linked to its refinement since the World Summit, especially the clarification that RtoP and humanitarian intervention are not ‘the same coin with a different face’<sup>2269</sup> and RtoP is not intended as ‘a tool to exert pressure’<sup>2270</sup> on smaller/weaker States. Chile points to a main issue which underscores RtoP’s political appeal:

‘Most Latin American leaders wanted to explore a better alternative to the dilemma of having to choose between inaction, on the one hand, and unilateral external intervention, on the other, to stop a humanitarian catastrophe. In other words, the morality of legitimacy had to be reconciled with international legality. R2P is the balanced formula we were looking for’.<sup>2271</sup>

Thus, the fact that secondary RtoP does not simply present a choice between ‘doing nothing and sending in the marines’<sup>2272</sup> has clearly helped RtoP to be distinguished from humanitarian intervention. Similarly, Chile’s view shows that the fact that RtoP does not create any legal changes to the existing regime on armed force, at least in the immediate term, has also been persuasive.

Essentially, RtoP’s refinement since the World Summit appears to have succeeded in reassuring a large number of States/territories that RtoP is an ‘ally of sovereignty, not an adversary’.<sup>2273</sup> Andorra is a good example of one of the reasons why several smaller and/or militarily weak territories find RtoP appealing. Andorra explicitly referred to the fact that it values RtoP because it is a small nation ‘without a standing army’.<sup>2274</sup> This suggests that RtoP may give small States/territories a sense of reassurance that, should their populations’ be harmed by non-State actors or another States’ actors, the international community may help them to develop the capacity to protect their own population or itself take decisive action to protect the population. Of course, we cannot state with certainty why smaller States find RtoP politically appealing. Indeed, a variety of issues quite probably underscore this. Remarkably, what can be said is that smaller States have made some of the strongest and most interesting contributions to RtoP’s development in practice to date. The table displays some examples.

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<sup>2269</sup> Statement of the Representative of *Sudan* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

<sup>2270</sup> Statement of *China* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98, emphasis added.

<sup>2271</sup> Statement of *Chile* to the UN General Assembly, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

<sup>2272</sup> A Bellamy, *Responsibility to Protect: Global Effort to End Mass Atrocities* (Polity Press, Cambridge 2009) 166.

<sup>2273</sup> UNSG Report, Implementing RtoP (n 2220), 7.

<sup>2274</sup> Statement of *Andorra* to UNGA in UN Press Release, ‘More than 40 Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 2264).

Table E: Notable Contributions to RtoP's Development made by Small States

Representative	Contribution(s)	Significance of Contribution(s) Made
<b>Czech Republic</b>	<p>One of few States, certainly the smallest State, to expressly incorporate the RtoP framework into national security policy.<sup>2275</sup></p> <p>Stood alone in recommending the establishment of regional RtoP focal points in order to ensure that regional responses are undertaken in a timely and effective manner.<sup>2276</sup></p> <p>One of few States to explicitly refer to RtoP at the Kampala conference on the crime of aggression, showing an awareness of the need to ensure that RtoP's discharge was not impeded by broader legal developments, such as defining the crime of aggression in the Rome Statute.<sup>2277</sup></p>	<p>Strong illustration of the way in which relatively recently established States can make some of the most innovative contributions to RtoP's development</p> <p>Shows faith in RtoP's capacity to become an effective protection framework at both the national, regional and international level.</p>
<b>Peru</b>	<p>Peru has unwaveringly encouraged the UNSC P5 to commit, albeit at a political level, to not invoke their veto power in cases involving RtoP crimes.<sup>2278</sup></p>	<p>Perseveres to ensure that discussions of the more controversial, but practically significant, aspects of RtoP do not fall by the wayside. Whilst the UNSC have not agreed to this, and may never do so, Peru's efforts in this regard are nevertheless commendable.</p>
<b>Denmark</b>	<p>Joined Ghana in establishing the first national RtoP adviser posts and urging other States to follow.<sup>2279</sup></p> <p>One of few States to positively connect RtoP with a collective right of populations to protection.<sup>2280</sup></p>	<p>Shows a strong commitment to RtoP and assumes a leadership role in the development of novel ways to translate RtoP into practice.</p>
<b>Norway</b>	<p>Explicitly incorporated the RtoP framework into its 2008-2009 national humanitarian policy.<sup>2281</sup></p>	<p>Illustrates the scope which States have in terms of the modes of discharging and codifying RtoP, including at the national level.</p>
<b>Trinidad and Tobago<sup>2282</sup></b>	<p>Trinidad and Tobago's UNGA delegation made one of the most explicit statements regarding the legal and moral content of secondary RtoP.</p>	<p>As a small Caribbean island, this contribution illustrates the extent to which RtoP has</p>

<sup>2275</sup> Ministry of Foreign Affairs of the Czech Republic, *Security Strategy of the Czech Republic 2011* (Ministry of the Foreign Affairs of the Czech Republic, Prague 2011) 13 para 45  
<[http://www.army.cz/images/id\\_8001\\_9000/8503/Czech\\_Security\\_Strategy\\_2011.pdf](http://www.army.cz/images/id_8001_9000/8503/Czech_Security_Strategy_2011.pdf)> accessed 28 October 2012. (Czech Republic 2011 Security Strategy).

<sup>2276</sup> Statement of the *Czech Republic* 2011 RtoP Thematic Debate (n 2263).

<sup>2277</sup> Statement of the *Czech Republic* ICC Review Conference (n 2234).

<sup>2278</sup> See e.g. Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319.

<sup>2279</sup> Joint Press Statement by the Ministers of Foreign Affairs of Ghana and Denmark (n 2241).

<sup>2280</sup> Statement of the Representative of *Denmark*, 'Opening of the Sixty First Session of the UN General Assembly' (27 September 2006) <<http://www.un.org/webcast/ga/61/index.shtml>> accessed 14 October 2012.

<sup>2281</sup> Norwegian Ministry of Foreign Affairs, *Norway's Humanitarian Policy* (Report No. 40 to the Storting, 2008-2009) 28 <<http://www.regjeringen.no/en/dep/ud/documents/propositions-and-reports/reports-to-the-storting/2008-2009/report-no-40-2008-2009-to-the-storting.html?id=577646>> accessed 24 October 2012 (Norway's 2008-2009 Humanitarian Policy) and Norwegian Ministry of Foreign Affairs, *Climate, Conflict and Capital: Norwegian Development Policy Adapting to Change* (Report No. 13 to the Storting, 2008-2009) 68

<<http://www.regjeringen.no/en/dep/ud/documents/propositions-and-reports/reports-to-the-storting/2008-2009/report-no-13-2008-2009-to-the-storting.html?id=552810>> accessed 24 October 2012. (Norway's 2008-2009 Development Policy).

<sup>2282</sup> Statement of *Trinidad and Tobago* (n 2268).

		become rooted in contemporary political rhetoric and the way in which it has crossed territorial and political frontiers.
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## 5 A Way Forward? Recommendations for RtoP's Future Development

RtoP has been substantially refined and clarified since the World Summit, including in terms of its means of discharge and its interplay with existing obligations. Indeed, if the Outcome Document were to be rewritten in light of the findings of this thesis, it would probably read in a very different way. The table illustrates some of the ways in which it would perhaps be worded if practice between 2005 and 2012 were to be fully incorporated.

Table F: The Outcome Document RtoP Paragraphs in light of Subsequent Practice

2005 Outcome Document Provisions	Practice 2005-2012	Associated Findings
<b>'Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.<sup>2283</sup></b>	<i>All non-State and State actors have a responsibility to refrain [1] from perpetrating genocide, grave breaches of international humanitarian law [2] and crimes against humanity (including ethnic cleansing [3]) against citizens, civilians and/or people [4] who are located inside the State's territorial borders and territories under their effective control [5].</i>	[1] Non-State actors should not perpetrate RtoP crimes [chapter two] and primary RtoP entails a negative component [chapter three]. This can be understood as a minimum standard of primary RtoP [chapter three]. [2] Possibility that not all war crimes may be considered sufficiently grave to fall within RtoP's scope [chapters two and four]. [3] The majority of States consider the reference to "ethnic cleansing" to be meant in the sense of ethnically motivated crimes against humanity [chapters one and three]. [4] Unsettled beneficiary concept [chapter two]. [5] Ambiguity over the State-centric nature of the primary RtoP bearer [chapter two].
<b>'This responsibility entails the prevention of such crimes, including their incitement'.<sup>2284</sup></b>	This responsibility <i>endures at all times</i> [1] and includes a responsibility to prevent the incitement or perpetration of genocide, grave breaches of international humanitarian law	[1] Primary RtoP duty subsists before, during and after the perpetration of RtoP crimes and can be discharged concurrently with secondary RtoP [chapter three].

<sup>2283</sup> Outcome Document (n 2240) para 138.

<sup>2284</sup> *ibid.*

	and crimes against humanity (including ethnic cleansing).	
<b>‘[T]hrough appropriate and necessary means’.</b> <sup>2285</sup>	To fulfil this responsibility, measures which can protect relevant persons, are appropriate to the <i>factual context inside the territory</i> [1], and <i>pursuant to existing legal obligations</i> [2], should be discharged <i>progressively</i> [3].	[1] States have a margin of appreciation regarding the specific measures which they use to discharge primary RtoP [chapter three]. [2] The measures used to discharge primary RtoP largely overlap with States’ existing human rights, humanitarian and criminal law obligations. Primary RtoP cannot be used to weaken these obligations [chapter three]. [3] States can discharge measures to fulfil primary RtoP progressively [chapter three].
<b>‘The international community should, as appropriate, encourage and help States to exercise this responsibility’.</b> <sup>2286</sup>  <b>‘We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out’.</b> <sup>2287</sup>	The international community should encourage, help and assist <i>State actors</i> [1] to fulfil their primary responsibility. International assistance will be given on a <i>consensual basis</i> [2], when the international community considers that genocide, grave breaches of international humanitarian law and crimes against humanity (including ethnic cleansing) are <i>imminent</i> . Imminence will be determined on the basis of a range of factors, including the <i>nature, gravity and scale of the human rights violations being perpetrated</i> [3]. If consent is not forthcoming, measures may be taken to <i>coerce or induce</i> it, including through the threat of using non-peaceful means [4]. In some situations, such as those involving competing claims to national electoral victory or where the existing government faces an armed insurrection because it has perpetrated the crimes, the international community may provide assistance to, or on the consent of, <i>whichever actor is considered to be the legitimate recipient of assistance</i> [5].	[1] Assistance will typically be given to the national authorities of the State at issue [chapters two, four and five]. [2] Assistance is provided on a consensual basis [chapters four and five]. [3] Assistance Pillar appears to require that human rights violations have emerged to suggest that the population may sustain RtoP crimes in the near or immediate future [chapters four and five]. [4] In practice, steps have been taken in response to a failure to provide consent to the provision of assistance [chapter five]. [5] In Libya, Syria and Côte d’Ivoire, assistance appears to have been provided to whichever actor is considered to have the most legitimacy [chapter five].
<b>‘The international community, through the United Nations, also has the responsibility to use appropriate diplomatic,</b>	The international community has a responsibility to use peaceful measures to help to protect all relevant persons from genocide,	[1] States take competing approaches to the meaning of “peaceful” responsive measures. Whilst some States consider that “peaceful” responsive measures

<sup>2285</sup> *ibid.*

<sup>2286</sup> *ibid.*

<sup>2287</sup> *ibid.*, para 139.

humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. <sup>2288</sup>	grave breaches of international humanitarian law and crimes against humanity (including ethnic cleansing) [1].	are those which do not challenge the State's national authorities (e.g. diplomatic condemnation of the situation), other States consider that these measures are anything which falls short of the use of collective sanctions or armed force. [Chapter five].
'In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. <sup>2289</sup>	The international community <i>should</i> [1] act <i>collectively</i> in a timely and decisive manner <i>through the UN Security Council</i> [2], <i>including through the incremental discharge of Chapter VII enforcement measures</i> [3] <i>to protect relevant persons</i> [4] from the crimes. Non-peaceful responses should be considered when the nature, gravity and scale of the human rights violations being committed suggest that the crimes are <i>imminent, if not already being perpetrated</i> and peaceful measures <i>have not ensured, or would not ensure</i> , relevant persons' protection [5]. Regional organisations which have the <i>relevant mandate and capacity</i> may contribute to the application of non-peaceful measures when Security Council authority <i>has been given</i> [6].	[1] There is no binding duty on the international community to discharge secondary RtoP [chapter six]. [2] There is a general consensus that non-peaceful responses should be undertaken through the UNSC on a collective basis, including with respect to the use of armed force [chapters five and six]. [3] In practice, the UNSC have discharged Chapter VII enforcement measures on an incremental basis [chapter five]. [4] The approaches adopted to RtoP beneficiaries in international practice vary but, in terms of non-peaceful responsive measures, are usually linked to the protected person of the RtoP crime apprehended in the case at hand [chapter two and four]. [5] Pursuant to secondary RtoP's activation occurring largely on the basis of a sliding scale, the activation of non-peaceful responsive measures requires these two factors to be determined [chapter four]. [6] The role of regional organisations is dependent on a number of factors being present in a particular case, including that the organisation has the necessary capacity to undertake a non-peaceful response. In accordance with secondary RtoP's pursuance to relevant provisions of Chapter VIII of the UN Charter, regional organisations should have prior UNSC authorisation for non-peaceful responsive measures [chapters two, five and six].

The question which we now turn to is *what can be done in future practice* to address the nuances and implications which have arose in practice between 2005 and 2012? There is

<sup>2288</sup> *ibid.*

<sup>2289</sup> *ibid.*

strong moral appeal to “perfecting”<sup>2290</sup> secondary RtoP as a binding duty and using the regime on State responsibility to attach legal consequences to non-compliance with secondary RtoP.<sup>2291</sup> However, neither of these avenues for development has gained broad political support over the last seven years and Syria suggests that they are very unlikely to do so in the near future. Instead, States appear to have become less hesitant to the overall notion of RtoP because developmental initiatives have largely focused on refining *what States agreed to* in the Outcome Document. Consequently, this writer’s recommendations are targeted at refining and developing *what we already have*, specifically (i) settling those elements of the Outcome Document which give rise to ambiguity and controversy through the UNSG’s annual RtoP Reports and associated UNGA thematic debates, not least because these mechanisms are generally welcomed by States; and (ii) strengthening established mechanisms like the increasing number of national RtoP advisers.<sup>2292</sup>

## 5.1 Recommendation (1): Maximise the UN Secretary-General’s Annual RtoP Reports and UN General Assembly’s Annual RtoP Thematic Debates

Examination of State views illustrates that the UNSG’s annual RtoP Reports have productively guided the parameters of the UNGA annual RtoP thematic debates. Accordingly, this writer considers that the Reports could be used to constructively contribute to RtoP’s further development in two main ways. First, the Reports can open up discussion of RtoP’s *more intricate, but nevertheless significant, components*. The UNSG’s Reports have stressed the importance of not prioritising one aspect of RtoP over another, especially its timely and decisive response component over assistance.<sup>2293</sup> However, whilst Reports have been tailored toward particular components of the RtoP framework (e.g. early warning,<sup>2294</sup> the role of regional organisations,<sup>2295</sup> timely and decisive response<sup>2296</sup>), other significant components of the RtoP framework have not been considered in similar depth

<sup>2290</sup> K Tan, “The Duty to Protect” in T Nardin and M Williams (eds), *Humanitarian Intervention* (New York University Press, New York 2006) 96.

<sup>2291</sup> See e.g. Stahn (n 2219), 115-120; M Payandeh, ‘With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking’ (2010) 35 *Yale Journal of Int’l L.* 469, 508-513 and L Glanville, ‘The Responsibility to Protect Beyond Borders’ (2012) 12 (1) *Hum Rts. L. Rev.* 1, 18-19 and 27-30.

<sup>2292</sup> See e.g. Joint Press Release by Australia, Costa Rica, Denmark and Ghana (n 2241).

<sup>2293</sup> See e.g. UNSG Report, Implementing RtoP (n 2220), 9 and Report of the UNSG, ‘Responsibility to Protect: Timely and Decisive Response’ (25 July 2012) UN Doc A/66/874-S/2012/578, 4. (UNSG Report, Timely and Decisive Response).

<sup>2294</sup> Report of the UNSG, ‘Early Warning, Assessment and the Responsibility to Protect’ (2010) UN Doc A/64/864.

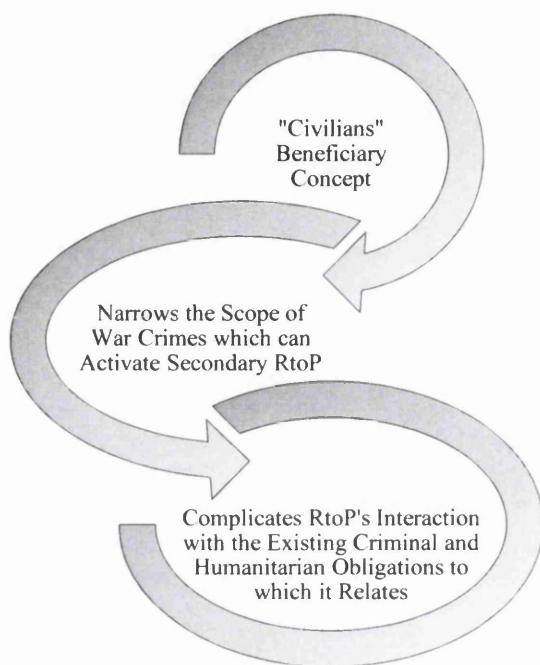
<sup>2295</sup> Report of the UNSG, ‘The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect’ (2011) UN Doc A/59/744.

<sup>2296</sup> UNSG Report, Timely and Decisive Response (n 2293).



(e.g. bearer/beneficiary concepts, secondary RtoP's activating threshold). The substantive chapters illustrate that ambiguity or controversy in one component of RtoP entails the capacity to trigger a "chain reaction" by destabilising additional components. For example:

Figure 1: Interaction between RtoP Components



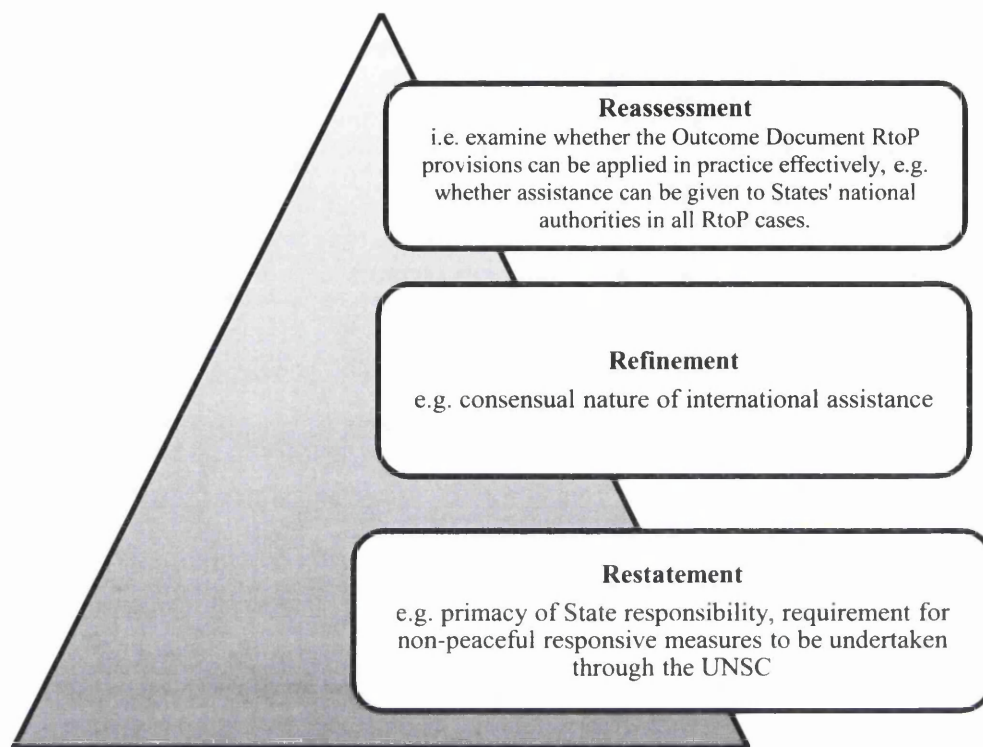
Thus, there is merit in fully considering (i) each of RtoP's component parts; (ii) the way in which one component interrelates with another; and (iii) what impact, if any, that the interconnectedness has upon RtoP's overall scope and effectiveness, including RtoP's relationship with existing obligations/practice. Accordingly, it could be beneficial for future UNSG RtoP Reports and UNGA thematic debates to follow a *component-by-component* approach to RtoP.

Second, the Reports could be used to initiate State discussion of the *potentially controversial issues* which have arisen in recent practice. The substantive chapters identified a number of issues which the UNSG's Reports address inadequately (e.g. providing that national authorities should receive assistance<sup>2297</sup>) or overlook entirely (e.g. whether regime change is an acceptable outcome of the use of armed force). Arguably, this is because the Reports have largely focused on affirming and subtly refining the Outcome Document RtoP provisions, giving limited attention to elements which may require reconsideration in light of subsequent practice. The pyramid illustrates the main approaches which have been adopted

<sup>2297</sup> UNSG Report, Implementing RtoP (n 2220), 18.

to date to the Outcome Document's RtoP provisions in the UNSG RtoP Reports:

Figure 2: The Approaches taken to the Outcome Document RtoP Provisions in UNSG RtoP Reports to date



Elements of the Outcome Document which *may require reassessment* are understandably given limited attention because they often lie at the heart of RtoP's interplay with sovereignty, territorial integrity and non-interference in States' internal affairs. Nevertheless, failing to address these issues enables competing (and equally controversial) approaches to be adopted in practice (e.g. providing assistance to "legitimate" rebel groups). Thus, avoiding controversial issues to maintain RtoP's political palatability can quickly become somewhat of a *vicious circle*. This writer considers that this tension may be moderated by using the Reports and debates to fully delineate the scope of RtoP's impact on these principles so that States can develop a deeper understanding of what they can do to avoid secondary RtoP being applied against them and, therefore, the prospect of regime change. To do so, the *evolution in the way in which States express their concerns* about RtoP could be usefully drawn upon when formulating future Reports. We still see sweeping statements about RtoP's impact on the principle of non-interference.<sup>2298</sup> However, States have begun to

<sup>2298</sup> See e.g. Statement of *Cuba* to the UNHRC in UN Press Release, 'UNHRC Debates Situation of Human Rights in Syrian Arab Republic' (22 August 2011) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11324&LangID=E>> accessed 14 November 2011.

clarify, directly or indirectly, the particular elements of RtoP which they are apprehensive about. For example, in the lead up to the World Summit Syria contended that RtoP contravened international law and had no place in the UN Charter.<sup>2299</sup> Whilst RtoP's invocation against Syria in recent times has seen the State resume this standpoint,<sup>2300</sup> it is important to offset the resistance which follows RtoP's application to its own internal affairs with the fact that Syria's main criticism of the UNSG's 2009 Report was that it did not explain RtoP's role in *Occupied Territories*.<sup>2301</sup> RtoP can only be refined in a robust and acceptable way if we first understand which aspects of RtoP trouble States. Whilst it is not easy to formulate RtoP in a way which reconciles completely the specific concerns of States, it seems less complex than engaging with far-reaching issues like RtoP's overall relationship with sovereignty and non-intervention. To achieve the abovementioned objectives, consideration could be given to targeting future UNSG Reports to the following range of topics.

#### 5.1.1 RtoP's Beneficiary Concept

RtoP's beneficiary concept merits reflection in its own right because, as outlined above, additional RtoP components seem to depend upon the beneficiary concept being settled and contoured effectively. The main issue which requires consideration is whether it is possible to maintain an overarching beneficiary concept like "populations".<sup>2302</sup> The varying approaches which have been adopted to RtoP beneficiaries in State views highlight the potentially widespread implications of an overarching concept, specifically that it can encourage States to engage in a process of *auto-interpretation* by determining the specific sections of populations which they consider warrant protection by RtoP. Similarly, it is difficult to reconcile an overarching beneficiary concept with the fact that the crimes which RtoP covers have varying protected person concepts and, therefore, that RtoP will often be applied in relation to specific groups and not the population more generally.

Developing a beneficiary concept which is attractive to all States and encompasses the range of persons for whom RtoP may be applied is certainly difficult. However, this writer considers that consideration could be given to following the third approach which has been adopted to the beneficiary concept in international practice. By specifying 'all

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<sup>2299</sup> Statement of the Representative of Syria to the UNGA in World Federalist Movement, 'State-by-State Positions on the Responsibility to Protect' (11 August 2005) <<http://www.responsibilitytoprotect.org/index.php/document-archive/civilsociety?view=fjrelated&id=2411>> accessed 11 October 2012.

<sup>2300</sup> Statement of the Representative of Syria to the UNSC, UNSC Verbatim Record (27 April 2011) UN Doc S/PV.6524.

<sup>2301</sup> Statement of the Representative of Syria to the UNGA, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105. (Statement of the Syrian Arab Republic to the UNGA, September 2009).

<sup>2302</sup> Outcome Document (n 2240), paras 138-139.

populations'<sup>2303</sup> should be protected, the approach makes clear that it is unacceptable for States to determine who they will protect from RtoP crimes on the basis of identity (e.g. non-citizens) or status (e.g. non-civilians). Furthermore, the approach takes into account the specifics of each context and adapts RtoP beneficiaries accordingly. For example, political violence has been met with emphasising the need to protect all populations, regardless of their 'political affiliation'.<sup>2304</sup> In addition, retaining some reference to "populations" helps to clarify what scale human rights violations should be perpetrated on in order to warrant secondary RtoP's application. Two issues may arise, however.

First, there is a risk that the approach could be seen *as an exhaustive list* of who in fact is protected under RtoP, triggering arguments over whether or not a group not expressly identified within the list is actually a beneficiary. To overcome this risk, we might draw upon the way in which international criminal law used the category of "other inhumane acts"<sup>2305</sup> to reconcile the challenge of ensuring that crimes against humanity were clearly defined, but sufficiently flexible to cover new crimes that might emerge within later practice. Consequently, this writer would suggest that future guidance might consider affirming that RtoP is owed to 'all persons permanently or temporarily in a territory, irrespective of race, ethnicity, nationality, political affiliation or other features'.

Second, there is the possibility that the reference to 'all populations'<sup>2306</sup> could reinforce the fact that an overarching concept like "populations" can raise the possibility of certain persons effectively having *concurrent status as an RtoP bearer and beneficiary*. As Chapter two observed this could create a potential circularity in terms of RtoP bearer-beneficiary and, therefore, complicate secondary RtoP's discharge in some cases by requiring the international community to ensure protection of all members of the population, including those who are perpetrating RtoP crimes. There are no easy answers to this issue. Perhaps the most appropriate route forward is to (i) recognise that there may be some points of departure between RtoP and existing human rights, humanitarian and criminal law obligations based

<sup>2303</sup> See e.g. UN Press Release, 'Statement attributable to the Spokesperson for Secretary-General on Guinea' (3 November 2010), emphasis added <<http://www.responsibilitytoprotect.org/index.php/crises/185-crisis-in-guinea/3046-secretary-general-ban-ki-moon-statement-attributable-to-the-spokesperson-for-secretary-general-on-guinea->> accessed 12 May 2012 (Statement on Guinea); UN Press Release, 'UN Secretary-General's Special Advisors on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire' (29 December 2010), emphasis added <<http://www.un.org/en/preventgenocide/adviser/pdf/Special%20Advisers'%20Statement%20on%20Cote%20d'Ivoire,%2029%20.12.2010.pdf>> accessed 12 May 2012 (Statement on the Côte d'Ivoire, December 2010) and UN Press Release, 'Statement attributed to the UN Secretary-General's Special Advisors on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire' (19 January 2011), emphasis added <<http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG,%20Special%20Advisers%20Statement%20on%20Cote%20d'Ivoire,%2019%20Jan%202011.pdf>> accessed 12 May 2012 (Statement on the Côte d'Ivoire, January 2011).

<sup>2304</sup> Statement on Guinea, *ibid*.

<sup>2305</sup> Rome Statute (n 2223) art 7 (1) (k). For a discussion of this provision see R Cryer (eds), *An Introduction to International Criminal Law and Procedure* (CUP, Cambridge 2007) 219.

<sup>2306</sup> e.g. Statement on Guinea (n 2303); Statement on the Côte d'Ivoire, December 2010 (n 2303) and Statement on the Côte d'Ivoire, January 2011 (n 2303).

on a process of *prioritisation* of *who is most in need* of protection from RtoP crimes in a *particular case*; and (ii) ensure that secondary RtoP's discharge is pursuant, as far as possible, to relevant human rights, criminal and humanitarian law obligations (e.g. use of armed force and principle of distinction). This could potentially be accommodated in the RtoP framework by specifying (i) that *secondary RtoP* will be discharged for the benefit of the *particular section* of the population who *are threatened by RtoP crimes*; and (ii) that there is some distinction between protection under secondary RtoP and the wider human rights framework, not least in terms of the former being activated when the human rights of a large number of individuals rights are violated, not isolated violations of the rights of some individuals in the State. Of course, this will be challenged by some States. Notably, Cuba alluded to the demerits of a process of prioritising who warrants the most protection, arguing:

‘[T]he current situation which is not reflected in the report of the Secretary General is the illegitimate implementation of the consensus of 2005 which is undermining international confidence. If we were to talk about a concept, we should begin by defining what is meant by protection and what is meant by civilians. Cuba does not agree that it's possible to arm civilians to end violence in a country or to try someone extra-judicially. All of these distortions come at a cost and that cost is credibility. We cannot see a concept where civilians can take a certain stand and other civilians become collateral damage’.<sup>2307</sup>

### 5.1.2 Primary RtoP

One of the reasons why primary RtoP has broad based political acceptance and appears to be at the stage of implementation is because States consider it to be pursuant to their existing human rights, humanitarian and criminal law obligations and, therefore, that which poses no direct threat to their sovereignty. This appeal could be strengthened by expressly explaining the full scope of primary RtoP's overlap with existing obligations, including primary RtoP's (i) enduring nature; (ii) inclusion of a margin of appreciation which enables States to determine what measures are most relevant to the specific factual context inside the State; and (iii) capacity to be discharged progressively.

Greater emphasis should also be placed upon the fact that primary RtoP is *not intended to weaken* States' existing protective obligations.<sup>2308</sup> Aside from reinforcing the need for State compliance with primary RtoP, this presents a *useful opening* to explain some of the ways in

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<sup>2307</sup> Statement of the Representative of *Cuba*, ‘Interactive Dialogue on Timely and Decisive Response’ (5 September 2012) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 17 October 2012. (Statement of the Representative of *Cuba*, 2012 RtoP Debate).

<sup>2308</sup> On this see UNSG Report, Implementing RtoP (n 2220), 5 and Statement of the Representative of *Switzerland* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

which primary RtoP *adds value* to States' existing obligations without compounding concerns over its capacity to expand States' obligations and 'creeping legalisation'.<sup>2309</sup> For example, outlining that primary RtoP is an ongoing duty which can be discharged concurrently with secondary RtoP (i) reinforces primary RtoP's interaction with the existing obligations to which it relates (e.g. enduring nature of human rights obligations); (ii) clarifies that secondary RtoP is *not* a matter of the international community subsuming States' protective obligations;<sup>2310</sup> and (iii) introduces discussion of the way in which primary RtoP is distinct from States' existing obligations, specifically by reason of the fact that it promotes new forms of achieving State compliance with existing human rights, humanitarian and criminal law obligations via secondary RtoP.<sup>2311</sup>

Potential impediments to primary RtoP's political appeal and effectiveness should also be broached as part of the broader consideration of how primary RtoP interconnects with existing obligations. A particular issue is the way in which the primary RtoP bearer concept can be reconciled with non-"State" territories, including Occupied Territories.<sup>2312</sup> Whilst providing for the State actors which have effective control over a territory to bear primary RtoP is pursuant to existing human rights and humanitarian law obligations,<sup>2313</sup> Chapter Two emphasised that there is a fundamental difference between recognition of a duty and its efficient enforcement. Moreover, practice suggests that there may be some State dissent (e.g. US) from using this approach, given that it paves the way for secondary RtoP to be discharged against the Occupying Power (e.g. Israel) when it fails to protect the population under its occupation (e.g. Gaza).<sup>2314</sup>

<sup>2309</sup> W Burke-White, "Adoption of the Responsibility to Protect" in J Genser and I Cotler (eds), *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time* (OUP, Oxford 2012) 2.

<sup>2310</sup> Or as Russia phrases the issue, the purpose of secondary RtoP's discharge is 'to prompt the responsible State for implementing its obligations and not supplanting its role in doing so'. Statement of the *Russian Federation* to the UNGA, Interactive Dialogue on Timely and Decisive Response' (5 September 2012) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 18 October 2012. As noted in chapter four, this is contrary to the view of commentators like Stahn (n 2219), 116-117; Payandeh (n 2291) 498 and N Wheeler, 'A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit' (Paper presented at 'The UN at Sixty: Celebration or Wake?' conference, University of Toronto, Canada, 6-7 October 2005) <<http://cadair.aber.ac.uk/dspace/bitstream/2160/1971/1/a%20victory%20for%20common%20humanity,%20Wheeler.pdf>> accessed 12 May 2012.

<sup>2311</sup> On this see Chapter six.

<sup>2312</sup> Statement of the Permanent Observer of the *Occupied Palestinian Territories* to the UNGA, UN Press Release (July 2009) UN Doc GA/10850 ['despite the recognition that all populations are entitled to [...] protection, we find that relevant literature, including the Secretary-General's important Reports, to be selective, focusing on some situations while ignoring others'] and Statement of the *Syrian Arab Republic* to the UNGA, September 2009 (n 2301) [criticising the UN Secretary-General's Report on Implementing RtoP for its 'failure to refer to the need for due protection for populations under foreign occupation'].

<sup>2313</sup> UN Human Rights Committee, 'General Comment No. 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13; European Court of Human Rights, *Al Skeini & Others v. The United Kingdom*, 2011, *Application No. 55721/07*, para 74 and D Gierczyk, "The Responsibility to Protect: A Legal and Rights-Based Perspective" in A Bellamy, S Davies and L Glanville (eds), *The Responsibility to Protect and International Law* (Martinus Nijhoff, Leiden 2011) 109-113.

<sup>2314</sup> The US position on the citation of RtoP in the context of the Gaza conflict is discussed at length in Chapters Two and Six. See Statement of the *United States* to the UNHRC, 'Human Rights Council Concludes Debate on Report of High-Level Mission on Situation of Human Rights in Darfur' (16 March 2007) UN Doc HRC/07/13

Perhaps most significantly, a Report on primary RtoP could be used to add greater *consistency* to existing recommendations for monitoring State compliance therewith. Whilst the UNSG's 2009 Report recommended that the UNHRC be used to monitor State compliance with primary RtoP,<sup>2315</sup> the UNSG's 2012 Report limited the UNHRC's role to identifying emerging patterns of human rights violations which could result in RtoP crimes.<sup>2316</sup> Arguably, the fact that some States encouraged<sup>2317</sup> and/or challenged<sup>2318</sup> the "RtoP-right to protection" interplay may underscore this subtle shift. However, the UNSG did not state this explicitly and, therefore, the tentative nature of this interpretation must be borne in mind. Nevertheless, if States are to be expected to have confidence in RtoP's capacity to function effectively, then policymakers must ensure that delineations about 'what RtoP is and is not'<sup>2319</sup> are made consistently and, furthermore, to explain why any departures from earlier recommendations have been made.

### 5.1.3 Secondary RtoP's Activation

In principle, delegating the task of making decisions on secondary RtoP's activation to one particular body could perhaps represent the most suitable way of overcoming the risks of variable and politicised decision making. However, this would not be possible in practice because the Outcome Document provides for the UNSC to utilise their Chapter VII mandate to discharge secondary RtoP<sup>2320</sup> and, therefore, the activation of Chapter VII measures would still fall to the UNSC even if decision making on secondary RtoP's activation was allocated to one particular body. *Prima facie*, this could be circumvented by appointing committees which deal with decisions regarding the *activation of the specific mandates of particular bodies in RtoP cases*. For example, to take up Gambia's<sup>2321</sup> proposal to appoint a UNSC Committee on RtoP and/or the Czech Republic's<sup>2322</sup> recommendation to appoint national focal points of regional organisations to streamline their discharge of RtoP. The respective

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<<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/1215DB0D2AE13E5CC12572A30079E53B?opendocument>> accessed 11 May 2011 and UN HRC, 'Report of the UN Fact Finding Mission on the Gaza Conflict' (15 September 2009) UN Doc A/HRC/12/48, 520.

<sup>2315</sup> UNSG Report, Implementing RtoP (n 2220), 11.

<sup>2316</sup> UNSG Report, Timely and Decisive Response (n 2293), 10.

<sup>2317</sup> Statement of *Monaco*, 2009 RtoP Thematic Debate (n 2266).

<sup>2318</sup> Statement of the Representative of *Morocco* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 and Statement of the Representative of *Nicaragua* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100.

<sup>2319</sup> Luck, 'The Normative Journey' (n 2259).

<sup>2320</sup> Outcome Document (n 2240), para 139.

<sup>2321</sup> Statement of the Representative of *Gambia* to the UNGA in UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (28 July 2009) UN Doc GA/10850.

<sup>2322</sup> Statement of the Czech Republic, 2011 RtoP Thematic Debate (n 2263).

committees could be mandated to determine when a situation has activated the existing mandates of relevant bodies (e.g. Chapter VII of the UN Charter) and perhaps recommend suitable measures to apply in the case at hand. However, no other States have supported either recommendation to date and, therefore, the prospect for future appointment of these committees is questionable.

Contrary to the view of Rosenberg and Strauss,<sup>2323</sup> there is also likely to be limited viability to developing a ‘common standard’<sup>2324</sup> for *when* particular bodies are required to take action in order to protect populations from RtoP crimes. Practice suggests that the formulation of objective standards concerning secondary RtoP’s activation would be unlikely to positively influence States *to act*. Although we have objective definitions of RtoP crimes, certain States<sup>2325</sup> have *simply evaded* mentioning whether RtoP crimes are being committed in practice, particularly Syria. This is quite likely done in order to avoid activating the concurrent responsibility to undertake a ‘timely and decisive’<sup>2326</sup> response. Thus, we cannot be confident that the devisal of objective formulas for activation will positively influence international decision making.

The present author considers that it is more feasible for the UNSG Reports to concentrate on *clarifying* secondary RtoP’s activation and the way in which this can *fit into the existing international framework*. First, the nature and scope of secondary RtoP’s activation in practice to date should be explicitly outlined in order to further contour RtoP’s interplay with sovereignty and non-interference in the minds of States. To this effect, explicit explanations of the fact that secondary RtoP has segregated tipping points which each require the population to have sustained some harm can help to reassure States that secondary RtoP cannot be legitimately discharged against them unless the population has sustained harm of a particular gravity, scale and nature.

Second, consideration should be given to how to develop upon the more nuanced aspects of secondary RtoP’s activation, not least whether it will always be possible to reconcile the UNHRC’s human rights mandate with the important role that it plays in identifying patterns of human rights violations which may amount to RtoP crimes. This writer would argue that consideration could be given to explaining the significance and utility of referring throughout earlier UNSG RtoP Reports to secondary RtoP being activated by ‘crimes and violations’<sup>2327</sup> to which it relates. This approach more appropriately reflects the kind of acts

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<sup>2323</sup> S Rosenberg and E Strauss, ‘A Common Approach to the Application of the Responsibility to Protect’ in D Fiott et al, *Operationalising the Responsibility to Protect: A Contribution to the Third Pillar Approach* (The Madariaga College of Europe Foundation, Brussels 2012). (Rosenberg and Strauss, ‘A Common Approach’).

<sup>2324</sup> *ibid*, 59.

<sup>2325</sup> Syria is a strong example. See e.g. the Statements of the *Russian Federation, China, Lebanon and India* to UNSC, UNSC Verbatim Record (4 October 2011) UN Doc S/PV.6627.

<sup>2326</sup> Outcome Document (n 2240), para 139.

<sup>2327</sup> The phrase is used throughout the UNSG Report, Implementing RtoP (n 2220) and UNSG Report, Timely and Decisive Response (n 2293).



which can activate secondary RtoP and, furthermore, that activation can occur on a *sliding scale*. To this effect, the approach highlights that secondary RtoP can be activated by (i) RtoP crimes; *and* (ii) human rights violations which, due to their gravity and scale, suggest that RtoP crimes may be imminent even if they are not necessarily being committed at the time. Accordingly, this approach helps to legitimise (i) RtoP actors (e.g. Special Adviser) referring to human rights violations as opposed to only RtoP crimes;<sup>2328</sup> and (ii) human rights actors (e.g. UNHRC) referring to RtoP crimes as opposed to only human rights violations.<sup>2329</sup> Some may question whether it is appropriate to retain any reference to “crimes” given that activation assessments tend not to consider mens rea issues and, furthermore, the prospect for the criminal basis of RtoP to encourage relevant political bodies to draw increasingly upon international law in their decision making (e.g. the UNSC).<sup>2330</sup> However, this writer considers that retaining the reference helps to distinguish the dual purpose for which secondary RtoP can be activated, that is (i) to respond to RtoP crimes; and (ii) to prevent grave human rights violations from developing into RtoP crimes. A UNSG’s Report on secondary RtoP’s activation could therefore be used to raise the possibility of basing future decisions on secondary RtoP’s activation on the presence of ‘crimes and violations relating to’<sup>2331</sup> RtoP. Moreover, a Report on activation could provide the opportunity for renewed discussion of the scope of the crimes which can activate secondary RtoP. Policymakers, such as the (now former) Special Adviser on RtoP have recognised that there are divergent views on what war crimes RtoP covers and, therefore, that the scope of the crimes to which RtoP relates requires further consideration.<sup>2332</sup> This writer considers that this issue warrants discussion among States in the near future given the capacity for ambiguity and competing interpretations on this issue to form the basis of new arguments about when RtoP should and should not be applied.

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<sup>2328</sup> See e.g. UN Press Release, ‘Statement of the Special Advisers of the United Nations Secretary-General on the Prevention of Genocide and Responsibility to Protect on the Situation in Syria’ (2 June 2011) <<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 27 July 2012.

<sup>2329</sup> See e.g. UNHRC Res S-16/1 (29 April 2011) UN Doc A/UNHRC/RES/S-16/1, para 1.

<sup>2330</sup> Rosenberg is one example, writing: ‘[t]he objective of the determination of relevant human rights violations is not the identification of separated legal categories of mass atrocity crimes on the one hand and other human rights violations on the other, but a common consciousness of the risks involved in any massive violation of human rights’. Rosenberg and Strauss, ‘A Common Approach’ (n 2323) 71.

<sup>2331</sup> UNSG Report, Implementing RtoP (n 2220) and UNSG Report, Timely and Decisive Response (n 2293).

<sup>2332</sup> E C Luck, ‘Conceptual, Institutional and Political Challenges’ (Forward Looking Session, European Science Foundation Conference ‘The Responsibility to Protect from Principle to Practice’, Linköping, Sweden, 11 June 2010). See further, Rosenberg and Strauss, ‘A Common Approach’ (n 2323) 59; J Kleffner, ‘The Scope of the Crimes Triggering the Responsibility to Protect’ in J Hoffman and A Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice* (Amsterdam University Press, Amsterdam 2012) 88-89.

#### 5.1.4 International Assistance

Secondary RtoP's assistance component has so far only been outlined in the UNSG's 2009 Report on RtoP's implementation. This writer considers that a future report should focus specifically on this component in order to (i) open up State discussion of some of the issues which have emerged in recent practice; and (ii) to explain to States the scope of this component more fully.

In terms of the former, the main issue which requires consideration is *to whom assistance should be given when national authorities are themselves perpetrating RtoP crimes*. There are no clear cut solutions to this question. Indeed, some States used the 2012 UNGA thematic debate to explicitly caution against providing assistance to non-State actors in order to protect the population.<sup>2333</sup> Notwithstanding its politically volatile nature, this issue cannot be simply avoided by policymakers because it is central to (i) defining the scope of RtoP's impact on non-interference; and (ii) increasing the prospect for RtoP to be applied effectively to protect populations in varying factual contexts. Particular attention should be given to whether it is possible to reconcile secondary RtoP's assistance component with the principle of neutrality in civil wars when cases like Libya and Syria illustrate that assistance may be provided to whatever actor is considered to have the most *legitimacy*. It may be that another point of departure between RtoP and the existing international framework has to be conceded. However, certain steps may be taken to ease States' reservations over this concession.

First, it may be beneficial to recommend that decisions on the legitimate recipient of assistance be made *collectively*, as was the case with the UNSC's authorisation for the extension of peacekeepers based on the consent of the President elect in Côte d'Ivoire.<sup>2334</sup> Admittedly, this will not prevent third States from providing assistance outside of the UN framework. However, it may help to ease concerns of prominent States like the UNSC P5 by reinforcing their *leading* role in discharging secondary RtoP, at least in terms of authorising military assistance. Second, it is useful to explicitly outline what States can do to *avoid experiencing* the provision of international assistance to "legitimate" actors in their own territories. This can be achieved by (i) reinforcing the importance of complying with primary RtoP (as the UNSG is increasingly doing)<sup>2335</sup>; (ii) emphasising that national authorities' *failure to consent* to the provision of necessary international assistance may compel other

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<sup>2333</sup> See e.g. the Statement of the Representative of *Cuba*, 2012 RtoP Debate (n 2307) and Statement of the Representative of *South Africa*, 'Interactive Dialogue on Timely and Decisive Response' (5 September 2012) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 17 October 2012 (Statement of *South Africa*, 2012 RtoP Debate).

<sup>2334</sup> Statement of the *Côte d'Ivoire*, March 2011 (n 2228).

<sup>2335</sup> The UNSG places particular emphasis on this in his 2012 Report. See UNSG Report, Timely and Decisive Response (n 2293).

legitimate recipients to be identified; and (iii) to candidly remind States of the ‘slippery-slope’<sup>2336</sup> dimension to secondary RtoP, specifically that non-cooperation with international assistance encourages the application of responsive measures, including the application of collective sanctions and the use of armed force.

Third, the scope of secondary RtoP’s assistance component should be explained in more detail, not least because this may help to alleviate concerns over its capacity to increase external interference in States’ internal affairs. A number of issues could be made more explicit, including (i) that the purpose of RtoP’s assistance component is multifaceted, coming into play when States’ national authorities request assistance or when it becomes clear that a situation could be on track to entailing RtoP crimes; and (ii) that the international community’s role in providing assistance can vary from sending humanitarian assistance to deploying peacekeepers.<sup>2337</sup> The former reinforces the fact that assistance is not intended to apply *in advance of* any RtoP-type harm and, therefore, act as a precursor for the installation of structural change in a State like the creation of democracy.<sup>2338</sup> The latter emphasises to States that international assistance will not always equate to ‘boots on the ground’.<sup>2339</sup>

A Report and thematic debate on RtoP’s assistance component may also be utilised as an opportunity to connect with the more intricate issues surrounding its discharge. Chapter Five observed that development assistance is one of the few structural assistance recommendations which have some State support<sup>2340</sup> and, furthermore, that the UNSG recommended that it be discharged ‘to give the poor and minority groups a stronger voice in their societies’.<sup>2341</sup> An assistance Report could be used to explain to States the significance of this recommendation, specifically that it strengthens the component’s pursuance to existing approaches, such as (i) the requirement for assistance initiatives to pay ‘due regard for the legitimate interests of persons belonging to minorities’;<sup>2342</sup> and (ii) rights-based approaches to development assistance favoured by some States.<sup>2343</sup> In addition, Chapter Two noted that the UNSG’S 2009 recommendation for assistance to be given to States which

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<sup>2336</sup> J Alvarez, ‘The Schizophrenias of RtoP’ (Panel Presentation, ‘The Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference’, The Hague, 30 June 2007).

<sup>2337</sup> The various forms of assistance were outlined in detail in Chapter five, Section.

<sup>2338</sup> See N Oman, ‘The ‘Responsibility to Prevent’: A Remit for Intervention?’ (2009) 22 Can. J. L. & Jurisprudence 355, 365.

<sup>2339</sup> Andrew Mitchell MP, ‘UN Peacekeeping and the Failure to Protect’ (Speech to the Royal United Services Institute for Defence and Security Studies, 18 June 2007) cited in A Brown, ‘Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?’ (2008) House of Commons Research Paper 08/55, 51.

<sup>2340</sup> See e.g. Statement of the Representatives of the *United Kingdom, Canada, Brazil, Uruguay, Malaysia, Mexico and Ecuador* to the UNGA, ‘Informal Debate on Early Warning, Assessment and the Responsibility to Protect’ (9 August 2010) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 17 October 2012.

<sup>2341</sup> UNSG Report, Implementing RtoP (n 2220), 19.

<sup>2342</sup> UNGA Res 47/135, ‘Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities’ (1992) UN Doc A/RES/47/135 art 5 (2).

<sup>2343</sup> On this see preference see e.g. P Uvin, ‘From the Right to Development to the Rights-Based Approach: How Human Rights Entered Development’ (2007) 17 (4/5) Development in Practice 597.

cannot discharge primary RtoP due to a ‘lack of territorial control’.<sup>2344</sup> Thus, some thought could be given to explaining that assistance can be given to strengthen a State’s effective control over all of its territory and, therefore, easing concerns regarding the primary RtoP bearer in secessionist enclaves. Of course, this recommendation should be qualified to (i) situations where the States’ national authorities *are not* perpetrating RtoP crimes; and (ii) helping effective control be gained over the State’s internationally recognised borders (i.e. Georgia over South Ossetia, not Russia).

### 5.1.5 Outcomes of Secondary RtoP’s Discharge

The 2012 UNSG RtoP Report focuses on secondary RtoP’s timely and decisive response component. However, Chapter Five identified that this Report leaves unattended the important issue of whether regime change is an acceptable outcome of secondary RtoP’s discharge. Acknowledging that regime change is an appropriate outcome of secondary RtoP’s discharge in cases where national authorities are perpetrating RtoP crimes is likely to be the most politically controversial recommendation. Indeed, States like China<sup>2345</sup> and South Africa<sup>2346</sup> stressed at the 2012 UNGA thematic debate, RtoP must *not* be used to facilitate regime change. Nevertheless, it is difficult to see how this can be anything but necessary if a population is to be protected from RtoP crimes against the existing regime in the long term. The present author does not find proposals to regulate against abuse of secondary RtoP to create regime change to be compelling.<sup>2347</sup> Limiting the acceptability of regime change to cases where secondary RtoP is discharged through the use of armed force which is authorised by the UNSC is persuasive at a legal level.<sup>2348</sup> However, this is unlikely to be practically effective and/or always reconcilable with the moral legitimacy which underscores secondary RtoP. The Syria case study has reinforced the fact that P5 members like Russia and China will be unlikely to allow populations’ protection to be prioritised over non-interference, at least in cases where it is in their national interests to do so. Thus, is it viable to restrict the acceptability of regime change to UNSC authorised action? Perhaps the only route forward is to emphasise that regime change will only be an acceptable outcome of secondary RtoP’s discharge when there is (i) widespread recognition of populations’

<sup>2344</sup> UNSG Report, Implementing RtoP (n 2220), 10.

<sup>2345</sup> Statement of the Representative of *China* to the UNGA, ‘Interactive Dialogue on Timely and Decisive Response’ <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 17 October 2012.

<sup>2346</sup> Statement of *South Africa*, 2012 RtoP Debate (n 2333).

<sup>2347</sup> A Bellamy, ‘The Responsibility to Protect and the Problem of Regime Change’ (*e-International Relations*, 27 September 2011) <[www.e-ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change/](http://www.e-ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change/)> accessed 12 July 2012

<sup>2348</sup> *ibid.*

sustaining RtoP harm; and (ii) broad agreement that a State's national authorities are highly unlikely to heed the request of the international community and protect their population. Whilst this approach leaves scope for potential abuse, this writer concurs with the view that '[t]here should be no misuse of the responsibility to protect. But fears of its possible misuse should not inhibit us in the face of incitement and grave violence'.<sup>2349</sup> Presumably, this should encompass the removal of a regime which shows no signs of acceding to its duty to protect its own populations from RtoP crimes.

## **5.2 Recommendation (2): Capitalise on the Increasing Number of National RtoP Advisers and Annual Meetings of the Associated Network of RtoP Focal Points**

Bearing in mind the need to cautiously develop mechanisms which are associated with monitoring compliance with RtoP, this writer considers that strengthening the increasing number of national RtoP advisers and their associated standing network could be usefully explored. The main reason which underscores this recommendation is the *willing* nature of these actors. The appointment of national RtoP advisers by seventeen States (at the time of writing) and the participation of these and other States in the annual meetings of the network of RtoP focal points is undertaken on *a voluntary basis*.<sup>2350</sup> Accordingly, participating States have shown readiness to contribute to RtoP's furtherance and this could be conducive to primary and secondary RtoP's practical and legal development.

At a practical level, it is notable that novel ways of developing RtoP have been undertaken in the national context (e.g. humanitarian, foreign and security policies)<sup>2351</sup> and, furthermore, that there is increasing ministerial cooperation regarding RtoP issues.<sup>2352</sup> The annual meetings of the RtoP focal point network could therefore provide a useful opportunity

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<sup>2349</sup> UN Press Release, 'Responsibility to Protect Faces Urgent Test 'Here and Now'', Secretary-General Tells General Assembly, Stressing Immense Human Cost of Failure in Syria' (5 September 2012) UN Doc GA/11271. (UN Press Release, 'Responsibility to Protect Faces Urgent Test').

<sup>2350</sup> Joint Press Release by Australia, Costa Rica, Denmark and Ghana (n 2241).

<sup>2351</sup> See e.g. Czech Republic 2011 Security Strategy (n 2275); Norway's 2008-2009 Humanitarian Policy (n 2281); Norway's 2008-2009 Development Policy (n 2281); Federal Ministry of Defence, 'White Paper 2006 on German Security Policy and the Future of the Bundeswehr' (2006), 44; UK Cabinet Office, 'The National Security Strategy of the United Kingdom: Security in an Interdependent World' (2008), 48; Presidency de la Republique, 'The French White Paper on Defence and National Security' (2008), 9; Australian Government Department of Defence, 'Defending Australia in the Asia-Pacific Century: Force 2030' (2009), 43 and United States, 'National Security Strategy' (2010), 48. Policies of Germany, UK, France, Australia and the US are available at <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed: 10 October 2012.

<sup>2352</sup> Joint Press Release by the Governments of Botswana, Brazil, Denmark and the Netherlands, 'Ministerial Meeting on the Responsibility to Protect: Deepening our Commitment to Mass Atrocity Prevention' (28 September 2012) <<http://us4.campaign-archive1.com/?u=1fbfaa1c8b7e823de28eb944d&id=42f9103b88&e=c591ff507e>> accessed 10 October 2012. The meeting was attended by ministers from fifteen governments.

for States to share what they have done to strengthen and discharge RtoP at the national, regional and international level and, furthermore, encourage other members to take similar approaches. This kind of ‘State to State learning’<sup>2353</sup> process could motivate efforts to take concrete steps to fulfil primary RtoP at the national level and, furthermore, inspire relevant regional organisations and national governments to undertake more coordinated and consistent responses to RtoP cases in other States. The annual meetings could also provide a useful opportunity to produce a *non-binding memorandum* which summarises RtoP achievements and impediments over the course of the year, areas of consensus and divergence at relevant State debates and issues which should be given particular attention over the forthcoming period. At a legal level, the bodies represent a viable mechanism for willing States to put on record what *they have done* to discharge primary and secondary RtoP and the legal significance thereof. For example, to make the connection between primary RtoP and the creation of new interpretations of States’ existing humanitarian, criminal and human rights treaty obligations more explicit.

### **5.3 Recommendation (3): Bear in Mind the Broader Existing International Framework to which RtoP belongs: Minority Protection**

Policymakers cannot disregard RtoP’s interplay with existing protective frameworks,<sup>2354</sup> including those which have similarly divisive roots like minority protection. The few explicit references to this relationship in UNSG Reports<sup>2355</sup> and State views<sup>2356</sup> to date suggest that there is a general reluctance to delve into this specific relationship. Of course, the controversial policy issues which surround both areas means that there is a persuasive rationale for being cautious about explicitly linking the two. However, leaving this relationship to evolve in practice could mean that RtoP’s role in minority protection contexts becomes a double-edge sword, adding value in some ways (e.g. increased specificity to early warning systems) and compounding existing tensions in other ways (e.g. legitimising the

<sup>2353</sup> UNSG Report, Implementing RtoP (n 2220) 13.

<sup>2354</sup> The lack of attention which the UNSG Reports have given to RtoP’s role in women’s rights is outlined at length in existing literature. See e.g. H Charlesworth, ‘Feminist Reflections on the Responsibility to Protect’ (2010) 2 (3) GRtoP 232; J Bond and L Sherret, ‘Mapping Gender and the Responsibility to Protect: Seeking Intersections, Finding Parallels’ (2012) 4 (2) GRtoP 133; I Skjelsbaek, ‘Responsibility to Protect or Prevent? Victims and Perpetrators of Sexual Violence Crimes in Armed Conflicts’ (2012) GRtoP 154; E Stamnes, ‘The Responsibility to Protect: Integrating Gender Perspectives into Policies and Practices’ (2012) 4 (2) GRtoP 172; S E Davies and S Teitt, ‘Engendering the Responsibility to Protect: Women and the Prevention of Mass Atrocities’ (2012) 4 (2) GRtoP 198.

<sup>2355</sup> See e.g. *ibid*, 11 and 17; UNSG Report, Timely and Decisive Response (n 2293), 12.

<sup>2356</sup> See e.g. Statement of the Representative of *Holy See* to the UNGA, (July 2009) UN Doc GA/10850; Statement of the Representative of *Slovenia* to the UNGA in UN Press Release, ‘More than 40 Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 2264); Joint Statement of the Representatives of *Denmark and Costa Rica* to the UNGA (July 2009) UN Doc A/63/PV.97 and Statement of *Swaziland* (n 2267).

role of the Kin State through handling of the primary RtoP bearer concept and providing for national governments to be primary sources of information about potential RtoP situations). Instead, RtoP's interaction with the field of minority protection should be considered as a useful starting point for adding specificity to future Reports (and UNGA thematic debates).

As the substantive chapters and the above recommendations illustrate, casting RtoP assessments from the perspective of minority protection can enable a more robust appreciation of the potential policy and practical implications of RtoP's present formulation. This can help policymakers to identify some of the more intricate issues which should be taken into account when framing future strategies for RtoP's discharge. This includes (i) the need to ensure that development assistance provided under secondary RtoP does not discriminate against minorities; and (ii) the fact that present ambiguities in, and formulations of, the RtoP framework may enable Kin States to acquire a particular role in RtoP's discharge, including by acting as sources of information for RtoP's early warning system and as the bearer of primary RtoP in secessionist enclaves under their effective control.

#### **5.4 Recommendation (4): Develop RtoP in a Slow but Steady Manner**

Resistance to RtoP has been strongest when sudden steps toward its development have occurred, such as when the UNHRC high-level mission on the situation of human rights in Darfur used RtoP as an analytical framework for its report, declaring Sudan to have manifestly failed to fulfil primary RtoP and recommending the application of secondary RtoP.<sup>2357</sup> Thus, this writer recommends that relevant actors develop RtoP in a slow but steady manner, mindful of the potential impact which wider political contexts could have upon its mobilisation at any given time. Indeed, signs of this approach come through in recent practice. For example, the 2012 UNGA thematic debate was held in September, not the usual July. This suggests that the UNSG recognises that the continued debates over Syria and RtoP's role therein could detrimentally impact upon RtoP's reception by States.

Notwithstanding this, care should be taken to avoid standing back from RtoP too much at politically complex times. For instance, it is notable that the UNSG has not explicitly referred to RtoP in Mali, despite the RtoP-type crimes being perpetrated therein. Of course, the UNSG may be cautious over referring to RtoP in Mali alongside Syria. However, not doing so could raise significant questions, such as whether RtoP can be applied in cases which overlap with broader contentious issues like terrorism and the extent to which practice can be free from selectivity.<sup>2358</sup>

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<sup>2357</sup> UN HRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur' (9 March 2007) UN Doc A/HRC/4/80, 25.

<sup>2358</sup> Indeed, the recently appointed UN Deputy Secretary-General Jan Eliasson was asked by UN News: "With

## 6 The Responsibility to Protect: A Cause for Concern and Celebration

This chapter began by noting that RtoP has now been invoked in an expanse of country-specific practice. On the one hand, development process has undoubtedly provided greater clarity about ‘what RtoP is and what it is not’.<sup>2359</sup> Contrary to Shawki’s<sup>2360</sup> view that RtoP remains in the early stages of a norm’s development,<sup>2361</sup> practice suggests that primary RtoP has entered the implementation stage, whilst secondary RtoP is broadly regarded to *be capable of being implemented whilst it undergoes* further refinement. On the other hand, the explosive and rapidly evolving nature of world events over the research period have raised significant questions about whether the RtoP that stands today is sufficiently compelling to contribute constructively to the global protection endeavour.

Attending to these questions is a complex task which is perhaps best addressed through the intervention of willing actors (e.g. national RtoP advisers) and well-received mechanisms (e.g. the UNSG’s annual RtoP Reports). Sometimes, RtoP’s development may simply involve *making certain issues more explicit*, such as the duration of primary RtoP and the way in which this enables it to be discharged concurrently with secondary RtoP. In other instances, it may be necessary to *re-think elements of the RtoP framework itself* in order to ensure that all requisite components are formulated in a viable manner. This includes whether a populations beneficiary concept can hold in practice and the scope of the crimes which can activate secondary RtoP. On occasion, it may be necessary to *acknowledge that there are points of departure* between RtoP and existing obligations/practice, but that this usually arises because RtoP is intended to be a corrective framework which makes inroads into addressing the tension between the legality and legitimacy of protective action. This includes RtoP’s relationship with the principle of neutrality in civil wars and the possibility that the UNHRC may sometimes (albeit infrequently) lack a mandate on which to base its role in secondary RtoP’s activation. If RtoP is not to dissolve in the same way as humanitarian intervention, political palatability needs to be balanced proportionately with

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Syria dominating the international media landscape, is there the risk that pressing international crises are not receiving the attention that they warrant?” The Deputy Secretary-General answered: “That is a very legitimate question. Sometimes we focus on just one conflict and the rest is in tragic shadow”. UN News Centre, ‘Interview with UN Deputy Secretary-General Jan Eliasson’ (27 August 2012)

<<http://www.un.org/apps/news/newsmakers.asp?NewsID=68>> accessed 11 October 2012.

<sup>2359</sup> Luck, ‘The Normative Journey’ (n 2259).

<sup>2360</sup> N Shawki, ‘Responsibility to Protect: The Evolution of an International Norm’ (2011) 3 (2) GRtoP 172.

<sup>2361</sup> For example, Shawki argues that RtoP remains in the early stages of a norm’s development because it continues to be refined and States’ are still being encouraged ‘into embracing and applying’ its principles. Shawki, *ibid*, 183. For a more cautious view, outlining the possibility that the Outcome Document may come to be seen in subsequent practice as the ‘tipping point’ for consolidation of RtoP as a norm, see M Contarino, M Negron-Gonzales and K T Mason, ‘The International Criminal Court and Consolidation of the Responsibility to Protect as an International Norm’ (2012) 4 (3) GRtoP 275, 278-280. See also, J Welsh, ‘Implementing the Responsibility to Protect: Where Expectations Meet Reality’ (2010) 24 (4) Ethics & Int. Affairs 415.



protective viability throughout future practice. This means *openly confronting* the most controversial issues, not least whether regime change and providing assistance to a broader range of actors can be anything but inevitable when national authorities perpetrate RtoP crimes.

From the perspective of international law, RtoP is still in its formative years. There are signs that RtoP's refinement between 2005 and 2012 *has worked*, not least in the supportive statements which have been made from States across the geopolitical regions and the significant contributions made to RtoP's development by small States/territories. There are also signs that the refinement may have worked for the *wrong reasons*. After all, clarifying that secondary RtoP is not a binding duty to protect enables States to choose when to support and challenge RtoP's application, irrespective of the cost to human life. However, this discretion is pursuant to the RtoP that exists today and, quite likely, tomorrow.

Whether RtoP will be maintained in the years to come cannot be ascertained with certainty.<sup>2362</sup> What is clear is that RtoP's preservation over the past eleven years still inspires hope that, one day, RtoP will fulfil the promise of "Never Again".<sup>2363</sup> Equally clear is that, in the immediate backdrop of some States' failure to permit morality to prevail over politics, policymakers and RtoP 'face an urgent test here and now'.<sup>2364</sup> RtoP may make 'the pendulum'<sup>2365</sup> swing 'decisively in the direction of greater protection'<sup>2366</sup> for populations. However, this writer anticipates that, in the immediate future at least, the pendulum will lie somewhere between "RtoP" and what may be termed "PtR", "Protecting the Responsibility"...

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<sup>2362</sup> Luck illustrates that this uncertainty is not new by posing the following question: '[H]ow many pundits foresaw how instrumental human rights principles eventually would be in reshaping the geopolitical map' a decade after the adoption of the Genocide Convention? E C Luck, 'The Responsibility to Protect: The First Decade' (2011) 3 (4) GRtoP 387, 390.

<sup>2363</sup> UN Press Release, 'Responsibility to Protect Faces Urgent Test' (n 2349).

<sup>2364</sup> *ibid.*

<sup>2365</sup> *ibid.*

<sup>2366</sup> *ibid.*

# ANNEX I

## SURVEYED STATE VIEWS

### (a) Statements on the Provisional Draft Outcome Document April 2005<sup>2367</sup>

Statement of *Belarus* to the UNGA, ‘High-Level Meeting of the Plenary’ (20 April 2005) ¶ Statement of *Canada* to the UNGA, ‘High-Level Meeting of the Plenary’ (20 April 2005) ¶ Statement of *Cuba* to the UNGA, ‘High-Level Meeting of the Plenary’ (20 April 2005) ¶ Statement of *Switzerland* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Sweden* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Pakistan* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Qatar* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Peru* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *New Zealand* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Iceland* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Guatemala* to the UNGA, ‘High-Level Meeting of the Plenary’ (20 April 2005) [in Spanish] ¶ Statement of *Egypt* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Côte d’Ivoire* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Colombia* to the UNGA, ‘High-Level Meeting of the Plenary’ (20 April 2005) ¶ Statement of *Brazil* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Bangladesh* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Azerbaijan (on behalf of GUUAM)* to the UNGA, ‘High-Level Meeting of the Plenary’ (20 April 2005) ¶ Statement of the *United States* to the UNGA, ‘High-Level Meeting of the Plenary’ (20 April 2005) ¶ Statement of the *United Kingdom* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of the *Republic of Korea* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Norway* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Mexico* to the UNGA, ‘High-Level Meeting of the Plenary’ (20 April 2005) ¶ Statement of the *Marshall Islands* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Japan* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Iran* to the UNGA, ‘High-Level Meeting of the Plenary’ (20 April 2005) ¶ Statement of *Indonesia* to the UNGA, ‘High-Level Meeting of the Plenary’ (20 April 2005) ¶ Statement of *France* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *Luxembourg (on behalf of the European Union)* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005) ¶ Statement of *China* to the UNGA, ‘High-Level Meeting of the Plenary’ (19 April 2005).

### (b) Statements on Revised Draft Outcome Document Delivered Between June-July 2005<sup>2368</sup>

Statement of *Australia* to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005) ¶ Statement of *Brazil* to the UNGA, ‘High-Level Meeting of the Plenary’ (22 June 2005) ¶ Statement of *Canada* to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005) ¶ Statement of *Chile* to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005) ¶ Statement of *China* to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005) ¶ Statement of *Croatia* to the UNGA, ‘High-Level Meeting of the Plenary’ (21 June 2005) ¶ Statement of *Cuba* to the UNGA, ‘High-Level

<sup>2367</sup> All April Statements are available at

<[http://old.reformtheun.org/index.php/government\\_statements/c304?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c304?theme=alt2)> accessed 7 August 2012.

<sup>2368</sup> All June Statements are available at

<[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 7 August 2012.

Meeting of the Plenary' (21 June 2005) ¶ Statement of *Colombia* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005) ¶ Statement of *Dominica (on behalf of CARICOM)* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005) ¶ Statement of *Holy See* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005) ¶ Statement of the *European Union* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *France* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *Iceland* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *Iran* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *Japan* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *Israel* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005) ¶ Statement of the *Republic of Korea* to the UNGA, 'High-Level Meeting of the Plenary' (22 June 2005) ¶ Statement of *Liechtenstein* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *Mexico* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005) ¶ Statement of the *Non-Aligned Movement* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *New Zealand* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *Norway* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *Pakistan* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of the *Russian Federation* to the UN General Assembly, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *Singapore* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *South Africa* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *Sri Lanka* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005) ¶ Statement of *Tanzania* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005) ¶ Statement of the *United States* to the UNGA, 'High-Level Meeting of the Plenary' (22 June 2005) ¶ Statement of *Viet Nam* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005) ¶ Statement of *Algeria* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *Peru* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of the *United Kingdom* to the UNGA, 'High-Level Meeting of the Plenary' (22 June 2005) ¶ Statement of *Andorra* to the UNGA, 'High-Level Meeting of the Plenary' (22 June 2005) ¶ Statement of *Venezuela* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005) ¶ Statement of *Azerbaijan* to the UNGA, 'High-Level Meeting of the Plenary' (21 June 2005) ¶ Statement of *Panama* to the UNGA, 'High-Level Meeting of the Plenary' (30 June 2005) ¶ Statement of *Australia* to the UNGA, 'High-Level Meeting of the Plenary' (28 July 2005) ¶ Statement of *Malaysia* to the UNGA, 'High-Level Meeting of the Plenary' (1 July 2005) ¶ Statement of *Spain* to the UNGA, 'High-Level Meeting of the Plenary' (1 July 2005).

### (c) Statements Delivered on Revised Draft Outcome Document July-August 2005<sup>2369</sup>

Statement of *Argentina* to the UNGA, 'High-Level Meeting of the Plenary' (28 July 2005) ¶ Statement of *Iceland* to the UNGA, 'High-Level Meeting of the Plenary' (28 July 2005) ¶ Statement of *Liechtenstein* to the UNGA, 'High-Level Meeting of the Plenary' (29 July 2005) ¶ Statement of *Norway* to the UNGA, 'High-Level Meeting of the Plenary' (28 July 2005) ¶ Statement of *New Zealand* to the UNGA, 'High-Level Meeting of the Plenary' (28 July 2005) ¶ Statement of *Peru* to the UNGA, 'High-Level Meeting of the Plenary' (28 July 2005) ¶ Statement of the *United Kingdom* to the UNGA, 'High-Level Meeting of the Plenary' (28 July 2005) ¶ Statement of *Cuba* to the UNGA, 'High-Level Meeting of the Plenary' (1 August 2005) ¶ Statement of *Brazil* to the UNGA, 'High-Level Meeting of the Plenary' (1 August 2005) ¶ Statement of *Malaysia (on behalf of the Non-Aligned Movement)* to the UNGA, 'High-Level Meeting of the Plenary' (1 August 2005) ¶ statement of the *United States* to the UNGA, 'High-Level Meeting of the Plenary' (1 August 2005).

<sup>2369</sup> Statements are available at <[http://old.reformtheun.org/index.php/government\\_statements/c427?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c427?theme=alt2)> accessed 7 August 2012.

**(d) Statements Delivered on Revised Draft Outcome Document August 2005<sup>2370</sup>**

Statement of *Cuba* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Algeria* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Belarus* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Egypt* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Finland* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Germany* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *India* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Indonesia* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Ireland* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Malaysia* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Portugal* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of the *Russian Federation* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Rwanda* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Singapore* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *South Africa* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Spain* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Sri Lanka* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Sweden* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Switzerland* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of the *Syrian Arab Republic* to the UN General Assembly, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Tanzania* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Venezuela* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Viet Nam* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Mauritania (on behalf of the African Group)* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *CARICOM* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Luxembourg (on behalf of the European Union)* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005) ¶ Statement of *Malaysia (on behalf of the Non-Aligned Movement)* to the UNGA, ‘High-Level Meeting of the Plenary’ (August 2005).

**(e) Statements at the Adoption of the Outcome Document, General Assembly Resolution 60/1, World Summit of September 2005**

Statement of the Representative of *Sweden*, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.2 ¶ Statement of the Representative of *Rwanda*, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.4 ¶ Statement of the Representative of *Botswana*, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.4 ¶ Statement of the Representative of *Zimbabwe*, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.4 ¶ Statement of the Representative of *Pakistan*, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.4 ¶ Statement of the Representative of the *United Kingdom*, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.4 ¶ Statement of the Representative of *Malaysia*, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.4 ¶ Statement of the Representative of *Mauritius*, UNGA Meeting Record (15 September 2005) UN Doc A/60/PV.5 ¶ Statement of the Representative of *France*, UNGA Meeting Record (15 September 2005) UN Doc A/60/PV.5 ¶ Statement of the Representative of

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<sup>2370</sup> Full statements not available. However, the World Federalist Movement summarised the written statements circulated by governments with respect to the second revised draft Outcome Document which was released on the 5 August 2005. The exact dates on which each State made its statement is not given by the World Federalist Movement. See World Federalist Movement, ‘State-by-State Positions on the Responsibility to Protect’ (11 August 2005) <<http://www.responsibilitytoprotect.org/index.php/document-archive/civil-society?view=fjrelated&id=2411>> accessed 7 August 2012.

*Monaco*, UNGA Meeting Record (15 September 2005) UN Doc A/60/PV.6 ¶ Statement of the Representative of *Iceland*, UNGA Meeting Record (15 September 2005) UN Doc A/60/PV.6 ¶ Statement of the Representatives of *Burkina Faso*, *Solomon Islands* and *Kazakhstan*, UNGA Meeting Record (15 September 2005) UN Doc A/60/PV.6 ¶ Statement of the Representative of *Indonesia*, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *Norway*, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *Armenia*, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *New Zealand*, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *Australia*, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *Canada*, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *Guatemala*, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *Holy See*, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *Nigeria*, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.8 ¶ Statement of the Representative of *Venezuela*, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.8 ¶ Statement of the Representative of *Cuba*, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.8 ¶ Statement of the Representative of the *European Commission*, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.8 ¶ Statement of the Representative of *Brazil*, UNGA Meeting Record (17 September 2005) UN Doc A/60/PV.9 ¶ Statement of the Representative of the *United Kingdom*, UNGA Meeting Record (17 September 2005) UN Doc A/60/PV.9 ¶ Statement of the Representative of the *United States*, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.2 ¶ Statement of the Representative of the *United Kingdom*, UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.4 ¶ Statement of the *Secretary-General of the League of Arab States*, UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.8.

#### **(f) Statements at the Adoption of UNGA Resolution 63/308, September 2009**

Statement of the Representative of *Venezuela*, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105 ¶ Statement of the Representative of *Cuba*, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105 ¶ Statement of the Representative of *Syria*, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105 ¶ Statement of the Representative of *Bolivia*, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105 ¶ Statement of the Representative of *Sudan*, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105 ¶ Statement of the Representative of *Iran*, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105 ¶ Statement of the Representative of *Ecuador*, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105 ¶ Statement of the Representative of *Nicaragua*, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105 ¶ Statement of the Representative of *Rwanda*, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105 ¶ Statement of the Representative of *Guatemala*, UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105.

#### **(g) UNGA Thematic Debates on the Responsibility to Protect, 2009-2011**

##### **(i) 2009**

Statement of *Sweden (on behalf of the European Union)*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *Egypt (on behalf of the Non-Aligned Movement)*, UNGA Meeting

Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the *United Kingdom*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *Indonesia*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *France*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *the Philippines*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *Brazil*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *Guatemala*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *Bosnia and Herzegovina*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the *United States*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *Belgium* UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the *Republic of Korea*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *Australia*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *Liechtenstein*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Joint Statement of *Denmark and Costa Rica*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *New Zealand*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *the Netherlands*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *Italy*, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of *Austria* to the UNGA, ‘Thematic Debate on the Responsibility to Protect’ (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Pakistan*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Switzerland*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Algeria*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Singapore*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Ecuador*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Chile*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Morocco*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Colombia*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Israel*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *South Africa*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Uruguay*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Ghana*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Japan*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Czech Republic*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *China*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Mali*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Canada*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Nigeria*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Viet Nam*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Guinea-Bissau*, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of *Sri Lanka*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Sierra Leone*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Jamaica (on behalf of CARICOM)*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Myanmar*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Macedonia*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Slovakia*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Iran*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Russian Federation*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Nicaragua*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Iceland*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Armenia*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Timor-Leste*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Panama*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Democratic People’s Republic of Korea*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Botswana*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Kazakhstan*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Swaziland*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Bangladesh*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Benin*, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of *Tanzania*, UNGA Meeting Record (28 July

2009) UN Doc A/63/PV.100 ¶ Statements of the Representatives of *Cuba, Austria, Morocco, South Africa, Mali, Canada, Lesotho, Ireland, Venezuela, Norway, Germany, Bolivia, Romania, Slovenia, Monaco, Qatar, Solomon Islands, Croatia, Jordan, Luxembourg, Mexico, Rwanda, Turkey, Hungary, India, Andorra* and *San Marino* to the UNGA (24 July 2009)<sup>2371</sup> ¶ Statements of the Representatives of *Panama, Gambia, Peru, Argentina, Holy See, Palestine, Azerbaijan* to the UNGA (28 July 2009)<sup>2372</sup> ¶ Statement of the Representatives of *Sudan, Tanzania, Morocco, Saudi Arabia, Kenya, Bosnia and Herzegovina* to the UNGA (23 July 2009).<sup>2373</sup>

(ii) 2010<sup>2374</sup>

Statement of the Representative of *Argentina*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Armenia*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Bangladesh*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Benin*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Brazil*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Costa Rica*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Czech Republic*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *El Salvador*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Germany*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Guatemala*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Lebanon*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Mexico*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Nepal*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *the Netherlands*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Nicaragua*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Nigeria*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Pakistan*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Republic of Korea*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Senegal*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Solomon Islands*, ‘Thematic Debate on Early Warning, Assessment and the Responsibility to Protect’ (July 2010) ¶ Statement of the Representative of *Switzerland*, ‘Thematic

<sup>2371</sup> Statements in UN Press Release, ‘More than 40 Delegates Express Strong Scepticism, Full Support as General Assembly continues Debate on Responsibility to Protect’ (24 July 2009) UN Doc GA/10849 <<http://www.un.org/News/Press/docs/2009/ga10849.doc.htm>> accessed 2 January 2012.

<sup>2372</sup> Statements in UN Press Release, ‘Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate’ (28 July 2009) UN Doc GA/10850 <<http://www.un.org/News/Press/docs/2009/ga10850.doc.htm>> accessed 2 January 2012.

<sup>2373</sup> Statements in UN Press Release, ‘Delegates Seek to End Global Paralysis in Face of Atrocities as General Assembly holds Interactive Dialogue on Responsibility to Protect’ (23 July 2009) UN Doc GA/10847 <<http://www.un.org/News/Press/docs/2009/ga10847.doc.htm>> accessed 2 January 2012.

<sup>2374</sup> Statements are available at the International Coalition for the Responsibility to Protect, ‘Government Statements’ <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 6 January 2012.

Debate on Early Warning, Assessment and the Responsibility to Protect' (July 2010) ¶ Statement of the Representative of *Tanzania*, 'Thematic Debate on Early Warning, Assessment and the Responsibility to Protect' (July 2010) ¶ Statement of the Representative of the *United States*, 'Thematic Debate on Early Warning, Assessment and the Responsibility to Protect' (July 2010).

(iii) 2011<sup>2375</sup>

Statement of the Representative of *Armenia*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Australia*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Barbados* (*on behalf of CARICOM*), 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Belgium*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Brazil*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Canada*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *China*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Cuba*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Costa Rica* (*on behalf of Costa Rica, Denmark and Ghana*), 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Czech Republic*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Democratic People's Republic of Korea*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *France*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Georgia*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Germany*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Guinea*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Honduras*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Hungary*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Iran*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Ireland*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Israel*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Italy*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Japan*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Jordan*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July 2011) ¶ Statement of the Representative of *Kenya*, 'Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect' (July

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<sup>2375</sup> Statements are available at the International Coalition for the Responsibility to Protect, 'Government Statements' <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 6 January 2012.



2011) ¶ Statement of the Representative of *Lebanon*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011) ¶ Statement of the Representative of *Liechtenstein*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011) ¶ Statement of the Representative of *Morocco*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011) ¶ Statement of the Representative of *New Zealand*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011) ¶ Statement of the Representative of *Pakistan*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011) ¶ Statement of the Representative of *Republic of Korea*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011) ¶ Statement of the Representative of *Russian Federation*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011) ¶ Statement of the Representative of *Singapore*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011) ¶ Statement of the Representative of *Slovenia*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011) ¶ Statement of the Representative of *Sweden*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011) ¶ Statement of the Representative of *Switzerland*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011) ¶ Statement of the Representative of *The Netherlands*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011) ¶ Statement of the Representative of the *United Kingdom*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011) ¶ Statement of the Representative of the *United States*, ‘Thematic Debate on the Role of Regional Organisations in Implementing the Responsibility to Protect’ (July 2011).

#### **(h) UNGA Opening Session Debates, 2006-2011<sup>2376</sup>**

Statement of the Representative of *France* to the UNGA, ‘Opening of the Sixty First Session of the UNGA’ (September 2006) ¶ Statement of the Representative of *Sweden* to the UNGA, ‘Opening of the Sixty First Session of the UNGA’ (September 2006) ¶ Statement of the Representative of *Italy* to the UNGA, ‘Opening of the Sixty First Session of the UNGA’ (September 2006) ¶ Statement of the Representative of *Australia* to the UNGA, ‘Opening of the Sixty First Session of the UNGA’ (September 2006) ¶ Statement of the Representative of *Canada* to the UNGA, ‘Opening of the Sixty First Session of the UNGA’ (September 2006) ¶ Statement of the Representative of *Slovakia* to the UNGA, ‘Opening of the Sixty First Session of the UNGA’ (September 2006) ¶ Statement of the Representative of *Denmark* to the UNGA, ‘Opening of the Sixty First Session of the UNGA’ (September 2006) ¶ Statement of the Representative of *Liechtenstein* to the UNGA, ‘Opening of the Sixty First Session of the UNGA’ (September 2006) ¶ Statement of the Representative of *Palau* to the UNGA, ‘Opening of the Sixty First Session of the UNGA’ (September 2006) ¶ Statement of the Representative of *Slovenia* to the UNGA, ‘Opening of the Sixty First Session of the UNGA’ (September 2006) ¶ Statement of the Representative of *Hungary* to the UNGA, ‘Opening of the Sixty First Session of the UNGA’ (September 2006) ¶ Statement of the Representative of *Ireland* to the UNGA, ‘Opening of the Sixty First Session of the UNGA’ (September 2006) ¶ Statement of the Representative of *Trinidad and Tobago* to the UNGA, ‘Opening of the Sixty First Session of the UNGA’ (September 2006) ¶ Statement of the Representative of *Lithuania* to the UNGA, ‘Opening of the Sixty Second Session of the UNGA’ (September 2007) ¶ Statement of the Representative of the *United Kingdom* to the UNGA, ‘Opening of the Sixty Second Session of the UNGA’ (September

<sup>2376</sup> Statements available at International Coalition for the Responsibility to Protect, ‘Government Statements’.

Available at: <http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>. Last accessed 6 January 2012.

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Session of the UNGA' (September 2011) ¶ Statement of the Representative of *Ghana* to the UNGA, 'Opening of the Sixty Sixth Session of the UNGA' (September 2011) ¶ Statement of the Representative of *Sweden* to the UNGA, 'Opening of the Sixty Sixth Session of the UNGA' (September 2011) ¶ Statement of the Representative of *Costa Rica* to the UNGA, 'Opening of the Sixty Sixth Session of the UNGA' (September 2011) ¶ Statement of the Representative of *Zimbabwe* to the UNGA, 'Opening of the Sixty Sixth Session of the UNGA' (September 2011) ¶ Statement of the Representative of *Brazil* to the UNGA, 'Opening of the Sixty Sixth Session of the UNGA' (September 2011) ¶ Statement of the Representative of *Estonia* to the UNGA, 'Opening of the Sixty Sixth Session of the UNGA' (September 2011).

#### **(i) UNSC Thematic Debate on the Protection of Civilians in Armed Conflict (2005-2011)**

Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (11 November 2009) UN Doc S/PV.6216(Res.1) ¶ Statement of the Representative of *Ireland* to the UNSC, 'UNSC Verbatim Record' (11 November 2009) UN Doc S/PV.6216(Res.1) ¶ Statement of the Representative of *Belgium* to the UNSC, UNSC Verbatim Record (11 November 2009) UN Doc S/PV.6216(Res.1) ¶ Statement of the Representative of *Sri Lanka* to the UNSC, UNSC Verbatim Record (11 November 2009) UN Doc S/PV.6216(Res.1) ¶ Statement of the Representative of *Sudan* to the UNSC, UNSC Verbatim Record (11 November 2009) UN Doc S/PV.6216(Res.1) ¶ Statement of the Representative of *Rwanda* to the UNSC, UNSC Verbatim Record (11 November 2009) UN Doc S/PV.6216(Res.1) ¶ Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (4 December 2006) UN Doc S/PV.5577 ¶ Statement of the Representative of *Ghana* to the UNSC, UNSC Verbatim Record (4 December 2006) UN Doc S/PV.5577 ¶ Statement of the Representative of *Slovakia* to the UNSC, UNSC Verbatim Record (4 December 2006) UN Doc S/PV.5577 ¶ Statement of the Representative of *Japan* to the UNSC, UNSC Verbatim Record (4 December 2006) UN Doc S/PV.5577 ¶ Statement of the Representative of *Benin* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of *Italy* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of *Canada* (on behalf of Australia and New Zealand) to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of *Japan* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of *Tanzania* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of *South Africa* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of *Denmark* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of *Algeria* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1) ¶ Statement of the Representative of *Nepal* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1) ¶ Statement of the Representative of *Egypt* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1) ¶ Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1) ¶ Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1) ¶ Statement of the Representative of *Norway* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1) ¶ Statement of the Representative of *Slovakia* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1) ¶ Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1) ¶ Statement of the Representative of the *Republic of Korea* to the

UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1) ¶ Statement of the Representative of *Rwanda* to the UNSC, UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res.1) ¶ Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Tanzania* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Qatar* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Congo* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Argentina* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Austria* (on behalf of the European Union) to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Slovenia* (on behalf of the Human Security Network) to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Canada* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Guatemala* to the UNSC, UNSC Verbatim Record (28 June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Belgium* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 ¶ Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 ¶ Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 ¶ Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 ¶ Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 ¶ Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 ¶ Statement of the Representative of *Qatar* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 ¶ Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 ¶ Statement of the Representative of *Congo* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 ¶ Statement of the Representative of *New Zealand* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 ¶ Statement of the Representative of *Nigeria* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898(Res.1) ¶ Statement of the Representative of *Palestine* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898(Res.1) ¶ Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898(Res.1) ¶ Statement of the Representative of *Japan* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898(Res.1) ¶ Statement of the Representative of *Tanzania* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209 ¶ Statement of the Representative of *Benin* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209 ¶ Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209 ¶ Statement of the Representative of *The Philippines* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209 ¶ Statement of the Representative of *Denmark* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209 ¶ Statement of the Representative of *Luxembourg* (on behalf of the European Union) to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209 ¶ Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209 ¶ Statement of the Representative of *Colombia* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209 ¶ Statement of the Representative of *Luxembourg* (on behalf of the European Union) to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209 ¶ Statement of the Representative of *Norway* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209 ¶ Statement of the Representative of *Côte d'Ivoire* to the UNSC, UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209 ¶ Statement of the Representative of *Portugal* (on behalf of the European Union) to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 (Res.1) ¶ Statement of the Representative of *Nigeria* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc

S/PV.5781 (Res.1) ¶ Statement of the Representative of *Australia* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 (Res.1) ¶ Statement of the Representative of *Canada* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 (Res.1) ¶ Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 (Res.1) ¶ Statement of the Representative of *Mexico* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 (Res.1) ¶ Statement of the Representative of *Colombia* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781 (Res.1) ¶ Statement of the Representative of *Italy* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898 ¶ Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898 ¶ Statement of the Representative of the *Panama* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898 ¶ Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898 ¶ Statement of the Representative of *Burkina Faso* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898 ¶ Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898 ¶ Statement of the Representative of *Libyan Arab Jamahiriya* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898 ¶ Statement of the Representative of *Croatia* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898 ¶ Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898 ¶ Statement of the Representative of *Australia* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898 ¶ Statement of the Representative of *Slovenia* (on behalf of the *European Union*) to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898 ¶ Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898 ¶ Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (26 June 2009) UN Doc S/PV.6151 (Res.1) ¶ Statement of the Representative of *Italy* to the UNSC, UNSC Verbatim Record (26 June 2009) UN Doc S/PV.6151 (Res.1) ¶ Statement of the Representative of *Morocco* to the UNSC, UNSC Verbatim Record (26 June 2009) UN Doc S/PV.6151 (Res.1) ¶ Statement of the Representative of *Guatemala* to the UNSC, UNSC Verbatim Record (26 June 2009) UN Doc S/PV.6151 (Res.1) ¶ Statement of the Representative of *Venezuela* to the UNSC, UNSC Verbatim Record (26 June 2009) UN Doc S/PV.6151 (Res.1) ¶ Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *Italy* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *Qatar* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *Slovakia* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of the *Russian Federation* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *Belgium* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *Argentina* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *Mexico* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *Germany* (on behalf of the *European Union*) to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *Nigeria* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *Canada* (on behalf of CANZ) to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of the *Republic of Korea* to the UNSC, UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703 ¶ Statement of the Representative of *Rwanda* to the UNSC, UNSC Verbatim Record (22 June 2007) UN

Doc S/PV.5703 ¶ Statement of the Representative of *Austria* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066 ¶ Statement of the Representative of *Turkey* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066 ¶ Statement of the Representative of *Burkina Faso* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066 ¶ Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066 ¶ Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066 ¶ Statement of the Representative of the *Czech Republic* (on behalf of the European Union) to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066 ¶ Statement of the Representative of *Italy* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066 ¶ Statement of the Representative of *Belgium* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1) ¶ Statement of the Representative of *Bangladesh* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1) ¶ Statement of the Representative of *Finland* (on behalf of the Nordic Countries) to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1) ¶ Statement of the Representative of *Australia* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1) ¶ Statement of the Representative of *Tanzania* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1) ¶ Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1) ¶ Statement of the Representative of *Nicaragua* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1) ¶ Statement of the Representative of *Egypt* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1) ¶ Statement of the Representative of *Venezuela* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1) ¶ Statement of the Representative of *Sudan* to the UNSC, UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066(Res.1) ¶ Statement of the Representative of *Turkey* to the UNSC, UNSC Verbatim Record (7 July 2010) UN Doc S/PV.6354 ¶ Statement of the Representative of *Italy* to the UNSC, UNSC Verbatim Record (7 July 2010) UN Doc S/PV.6354 ¶ Statement of the Representative of the *European Union* to the UNSC, UNSC Verbatim Record (7 July 2010) UN Doc S/PV.6354(Res.1) ¶ Statement of the Representative of *Bangladesh* to the UNSC, UNSC Verbatim Record (7 July 2010) UN Doc S/PV.6354(Res.1) ¶ Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (7 July 2010) UN Doc S/PV.6354(Res.1) ¶ Statement of the Representative of *Venezuela* to the UNSC, UNSC Verbatim Record (7 July 2010) UN Doc S/PV.6354(Res.1) ¶ Statement of the Representative of *Nigeria* to the UNSC, UNSC Verbatim Record (22 November 2010) UN Doc S/PV.6427 ¶ Statement of the Representative of *Italy* to the UNSC, UNSC Verbatim Record (22 November 2010) UN Doc S/PV.6427 ¶ Statement of the Representative of *Argentina* to the UNSC, UNSC Verbatim Record (22 November 2010) UN Doc S/PV.6427(Res.1) ¶ Statement of the Representative of *Bangladesh* to the UNSC, UNSC Verbatim Record (22 November 2010) UN Doc S/PV.6427(Res.1) ¶ Statement of the Representative of *Ghana* to the UNSC, UNSC Verbatim Record (22 November 2010) UN Doc S/PV.6427(Res.1) ¶ Statement of the Representative of *Sudan* to the UNSC, UNSC Verbatim Record (22 November 2010) UN Doc S/PV.6427(Res.1) ¶ Statement of the Representative of *Venezuela* to the UNSC, UNSC Verbatim Record (22 November 2010) UN Doc S/PV.6427(Res.1) ¶ Statement of the Representative of *Brazil* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531 ¶ Statement of the Representative of *Portugal* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531 ¶ Statement of the Representative of *Germany* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531 ¶ Statement of the Representative of *Nigeria* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531 ¶ Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531 ¶ Statement of the Representative of *Lebanon* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531 ¶ Statement of the Representative of *Uruguay* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531 ¶ Statement of the Representative of *Italy* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531 ¶ Statement of the Representative of *Sri Lanka* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531 ¶ Statement of the Representative of *Japan* to

the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531 ¶ Statement of the Representative of *Australia* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1) ¶ Statement of the Representative of *Chile* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1) ¶ Statement of the Representative of *Ukraine* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1) ¶ Statement of the Representative of *Croatia* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1) ¶ Statement of the Representative of *Venezuela* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1) ¶ Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1) ¶ Statement of the Representative of *The Netherlands* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1) ¶ Statement of the Representative of *Syria* to the UNSC, UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531(Res.1).

## ANNEX II

### TRENDS IN STATE VIEWS

#### (A) The Bearers of RtoP

##### (a) Statements Affirming “States” as the Bearers of Primary RtoP

Statement of the Representative of *Argentina* to the UNSC, UNSC Meeting Record (December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of *Peru* to the UNSC, UNSC Meeting Record (December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of *China* to the UNSC, UNSC Meeting Record, (December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of *Norway* to the UNSC, UNSC Meeting Record (December 2005) UN Doc S/PV.5319 ¶ Statement of the Representative of *China* to the UNSC, UNSC Meeting Record (December 2006) UN Doc S/PV.5577 ¶ Statement of the Representative of the *United States* to the UNSC, UNSC Meeting Record (December 2006) UN Doc S/PV.5577 ¶ Statement of the Representative of *Slovakia* to the UNSC, UNSC Meeting Record (December 2006) UN Doc S/PV.5577 ¶ Statement of the Representative of *France* to the UNSC, UNSC Meeting Record (December 2006) UN Doc S/PV.5577 ¶ Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Meeting Record (June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *China* to the UNSC, UNSC Meeting Record (June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Ghana* to the UNSC, UNSC Meeting Record (June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Tanzania* to the UNSC, UNSC Meeting Record (June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of the *United States* to the UNSC, UNSC Meeting Record (June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Greece* to the UNSC, UNSC Meeting Record (June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Slovenia* to the UNSC, UNSC Meeting Record (June 2006) UN Doc S/PV.5476 ¶ Statement of the Representative of *Sri Lanka* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Sierra Leone* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV. 100 ¶ Statement of the Representative of *Jamaica (on behalf of the Caribbean Community)* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV. 100 ¶ Statement of the Representative of *Myanmar* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV. 100 ¶ Statement of the Representative of *Slovakia* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Iran* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of the *Russian Federation* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Timor Leste* to the UNGA July 2009 (GA/10850)<sup>2377</sup> ¶ Statement of the Representative of *Panama* to the UNGA July 2009 (GA/10850)<sup>2378</sup> ¶ Statement of the Representative of *Democratic Republic of Korea* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Ireland* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2379</sup> ¶ Statement of the Representative of *Armenia* to the UNGA, UNGA Meeting Record

<sup>2377</sup> UN Press Release, ‘Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate’ (28 July 2009) UN Doc GA/10850

<<http://www.un.org/News/Press/docs/2009/ga10850.doc.htm>> accessed 2 January 2012. (UN Press Release, ‘Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate’).

<sup>2378</sup> *ibid.*

<sup>2379</sup> UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (24 July 2009) UN Doc GA/10849



(28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Botswana* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Kazakhstan* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Swaziland* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Bangladesh* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Papua New Guinea* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Algeria* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Canada* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Pakistan* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Mali* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Austria* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Switzerland* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98.

## (b) Statements Endorsing the Principle of “Sovereignty as Responsibility”

Statement of the Representative of *Canada* to the UNGA, ‘Informal Meeting of the Plenary, on the High-Level Plenary Meeting of the General Assembly of September 2005’ (June 2005)<sup>2380</sup> ¶ Statement of the Representative of *France* to the UNGA, ‘Informal Meeting of the Plenary on the High-Level Plenary Meeting of the General Assembly of September 2005’ (June 2005)<sup>2381</sup> ¶ Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (20 November 2007) UN Doc S.PV.5781 ¶ Statement of the Representative of *Romania* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2382</sup> ¶ Statement of the Representative of the *Russian Federation* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of the *Solomon Islands* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2383</sup> ¶ Statement of the Representative of *Sri Lanka* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Timor Leste* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2384</sup> ¶ Statement of the Representative of *Cameroon* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Belgium* to the UNGA, General Assembly Thematic Debate on the Representative of *Mali* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Monaco* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2385</sup> ¶ Statement of the Representative of *France* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Cuba* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2386</sup> ¶ Statement of the Representative of *Uruguay* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Nigeria* to the UNGA, UNGA Meeting Record (24

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<<http://www.un.org/News/Press/docs/2009/ga10849.doc.htm>> accessed 2 January 2012. (UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’).

<sup>2380</sup> Available at <[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 14 May 2012.

<sup>2381</sup> *ibid.*

<sup>2382</sup> UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 2380).

<sup>2383</sup> *ibid.*

<sup>2384</sup> UN Press Release, ‘Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate’ (n 2378).

<sup>2385</sup> UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 2380).

<sup>2386</sup> *ibid.*

July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Japan* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Hungary* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2387</sup> ¶ Statement of the Representative of *Tanzania* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Lesotho* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2388</sup> ¶ Statement of *Holy See* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2389</sup> ¶ Statement of the Representative of *Jamaica (on behalf of the Caribbean Community)* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *India* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2390</sup> ¶ Statement of the Representative of *Ireland* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2391</sup> ¶ Statement of the Representative of *Guinea Bissau* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Sweden (on behalf of the European Union)* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Papua New Guinea* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Sierra Leone* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV. 100 ¶ Statement of the Representative of *Slovakia* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Joint Statement of the Representatives of *Denmark and Costa Rica* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Canada* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *The Philippines* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV. 97 ¶ Statement of the Representative of *South Africa* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of the *United States* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of the *Netherlands* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *New Zealand* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Liechtenstein* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of the *Republic of Korea* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Pakistan* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Italy* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Swaziland* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Croatia* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2392</sup> ¶ Statement of the Representative of *Bangladesh* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Botswana* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Armenia* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Bosnia & Herzegovina* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Palestine* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2393</sup> ¶ Statement of the Representative of *Azerbaijan* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2394</sup> ¶ Statement of the Representative of *Brazil* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Chile* to the UNGA, UNGA Meeting Record (24 July 2009) UN

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<sup>2387</sup> *ibid.*

<sup>2388</sup> *ibid.*

<sup>2389</sup> UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (n 2378).

<sup>2390</sup> UN Press Release, 'More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (n 2380).

<sup>2391</sup> *ibid.*

<sup>2392</sup> *ibid.*

<sup>2393</sup> UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (n 2378).

<sup>2394</sup> *ibid.*

Doc A/63/PV.98 ¶ Statement of the Representative of the *United Kingdom* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97.

### **(c) Statements Defining Primary RtoP Bearers as “Governments”**

Statement of the Representative of *Iceland* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.6 ¶ Statement of the Representative of *Liechtenstein* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *Panama* to the UNSC, UNSC Meeting Record (June 2007) UN Doc S/PV/5703 ¶ Statement of the Representative of *Sri Lanka* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Macedonia* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of the *Democratic Republic of Korea* UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Swaziland* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Tanzania* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Singapore* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *China* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Canada* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Nigeria* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *France* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of the *Republic of Korea* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Joint Statement of the Representatives of *Costa Rica and Denmark* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Italy* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Norway* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2395</sup> ¶ Statement of the Representative of *Kenya* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2396</sup> ¶ Statement of the Representative of *San Marino* to the UNGA (24 July 2009) UN Doc GA/10849.<sup>2397</sup>

### **(d) Statements Affirming that Regional Organisations are Members of the “International Community”**

Statement of the Representative of *Algeria* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Chile* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Colombia* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Ghana* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Nigeria* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Egypt (on behalf of the Non-Aligned Movement)* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of

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<sup>2395</sup> UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 2380).

<sup>2396</sup> UN Press Release, ‘Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate’ (n 2378).

<sup>2397</sup> UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 2380).

*Rwanda* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2398</sup> ¶ Statement of the Representative of *Gambia* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2399</sup> ¶ Statement of the Representative of *Sri Lanka* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Sierra Leone* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Slovakia* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Ireland* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2400</sup> ¶ Statement of the Representative of *Kazakhstan* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Swaziland* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Benin* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Tanzania* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Israel* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *South Africa* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Viet Nam* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Sweden (on behalf of the European Union)* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Indonesia* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *France* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of the *Philippines* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Bosnia and Herzegovina* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Belgium* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of the *Republic of Korea* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Joint Statement of the Representatives of *Costa Rica and Denmark* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *New Zealand* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Italy* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *India* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2401</sup> ¶ Statement of the Representative of *Iceland* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Hungary* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2402</sup> ¶ Statement of the Representative of *Germany* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2403</sup> ¶ Statement of the Representative of *Cuba* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2404</sup> ¶ Statement of the Representative of *Slovenia* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5476.

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<sup>2398</sup> *ibid.*

<sup>2399</sup> UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (n 2378).

<sup>2400</sup> UN Press Release, 'More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (n 2380).

<sup>2401</sup> *ibid.*

<sup>2402</sup> *ibid.*

<sup>2403</sup> *ibid.*

<sup>2404</sup> *ibid.*

## (B) Beneficiaries of RtoP

### (a) Statements Accepting “Populations” as RtoP Beneficiaries

Statement of the Representative of *Sweden* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.2 ¶ Statement of the Representative of *Rwanda* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.4 ¶ Statement of the Representative of *Sweden* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.6 ¶ Statement of the Representative of *New Zealand* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *Armenia* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *Guatemala* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of the *European Commission* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.8 ¶ Statement of the Representative of *Argentina* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5319 ¶ Statement of the Representative of *Italy* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5319 ¶ Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5319 ¶ Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476 ¶ Statement of the Representative of *Slovakia* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476 ¶ Statement of the Representative of *Tanzania* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476 ¶ Statement of the Representative of *Congo* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476 ¶ Statement of the Representative of *Argentina* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476 ¶ Statement of the Representative of *Austria* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476 ¶ Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476 ¶ Statement of the Representative of *Portugal* to the UNSC, UNSC Verbatim Record (November 2007) UN Doc S/PV/5781(Res.1) ¶ Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (November 2007) UN Doc S/PV/5781(Res.1) ¶ Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (May 2008) UN Doc S/PV/5898 ¶ Statement of the Representative of *Morocco* to the UNSC, UNSC Verbatim Record (June 2009) UN Doc S/PV/6151(Res.1) ¶ Statement of the Representative of *Sierra Leone* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Macedonia* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Iran* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Iran* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Nicaragua* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Ireland* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2405</sup> ¶ Statement of the Representative of *Botswana* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Swaziland* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Benin* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Austria* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Pakistan* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Algeria* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Chile* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *South Africa* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the

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<sup>2405</sup> *ibid.*

Representative of *Ghana* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Japan* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of the *Czech Republic* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Mali* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Canada* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Viet Nam* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Nigeria* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Sweden (on behalf of the European Union)* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Egypt (on behalf of the Non-Aligned Movement)* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of the *United Kingdom* to the UNGA, General Assembly UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Indonesia* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *France* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of the *Philippines* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Brazil* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Guatemala* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Bosnia and Herzegovina* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of the *United States* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Belgium* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of the *Republic of Korea* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Australia* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Liechtenstein* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Joint Statement of the Representatives of *Costa Rica and Denmark* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Italy* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Croatia* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2406</sup> ¶ Statement of the Representative of *Serbia* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2407</sup> ¶ Statement of the Representative of *Turkey* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2408</sup> ¶ Statement of the Representative of *Palestine* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2409</sup> ¶ Statement of the Representative of *Norway* to the UNGA (24 July 2009) UN Doc GA/10849.<sup>2410</sup>

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<sup>2406</sup> *ibid.*

<sup>2407</sup> UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (n 2378).

<sup>2408</sup> UN Press Release, 'More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (n 2380).

<sup>2409</sup> UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (n 2378).

<sup>2410</sup> UN Press Release, 'More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (n 2380).

## (b) Statements defining RtoP Beneficiaries as “Civilians”

Statement of the Representative of *Cuba* to the UNGA, ‘Informal Meeting of Plenary on the High Level Plenary Meeting of the General Assembly of September 2005’ (June 2005)<sup>2411</sup> ¶ Statement of the Representative of *Egypt* to the UNGA, ‘Informal Meeting of Plenary on the High Level Plenary Meeting of the General Assembly of September 2005’ (June 2005)<sup>2412</sup> ¶ Statement of the Representative of *Iran* to the UNGA, ‘Informal Meeting of Plenary on the High Level Plenary Meeting of the General Assembly of September 2005’ (June 2005)<sup>2413</sup> ¶ Statement of the Representative of *Pakistan* to the UNGA, ‘Informal Meeting of Plenary on the High Level Plenary Meeting of the General Assembly of September 2005’ (June 2005)<sup>2414</sup> ¶ Statement of the Representative of the *Russian Federation* to the UNGA, ‘Informal Meeting of Plenary on the High Level Plenary Meeting of the General Assembly of September 2005’ (June 2005)<sup>2415</sup> ¶ Statement of the Representative of *Syria* to the UNGA, ‘Informal Meeting of Plenary on the High Level Plenary Meeting of the General Assembly of September 2005’ (June 2005)<sup>2416</sup> ¶ Statement of the Representative of *Liechtenstein* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *Canada* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *Armenia* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (June 2005) UN Doc S/PV/5209 ¶ Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (June 2005) UN Doc S/PV/5209 ¶ Statement of the Representative of the *Philippines* to the UNSC, UNSC Verbatim Record (June 2005) UN Doc S/PV/5209 ¶ Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (June 2005) UN Doc S/PV/5209 ¶ Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (June 2005) UN Doc S/PV/5209 ¶ Statement of the Representative of *Colombia* to the UNSC, UNSC Verbatim Record (June 2005) UN Doc S/PV/5209 ¶ Statement of the Representative of *Luxembourg* to the UNSC, UNSC Verbatim Record (June 2005) UN Doc S/PV/5209 ¶ Statement of the Representative of *Benin* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5319 ¶ Statement of the Representative of *Peru* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5319 ¶ Statement of the Representative of *Nepal* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5319 ¶ Statement of the Representative of *Ghana* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476 ¶ Statement of the Representative of *Slovakia* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476 ¶ Statement of the Representative of *Qatar* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476 ¶ Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476 ¶ Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (June 2006) UN Doc S/PV/5476 ¶ Statement of the Representative of *Slovakia* to the UNSC, UNSC Verbatim Record (December 2006) UN Doc S/PV/5577 ¶ Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (December 2006) UN Doc S/PV/5577 ¶ Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (December 2006) UN Doc S/PV/5577 ¶ Statement of the Representative of *Ghana* to the UNSC, UNSC Verbatim Record (December 2006) UN Doc S/PV/5577 ¶ Statement of the Representative of *France* to the UNSC, UNSC Verbatim Record (December 2006) UN Doc S/PV/5577 ¶ Statement of the Representative of *Belgium* to the UNSC, UNSC Verbatim Record (June 2007) UN Doc S/PV/5703 ¶ Joint Statement of the Representative’s of *Canada, Australia and New Zealand* to the UNSC, UNSC Verbatim Record (June 2007) UN Doc S/PV/5703 ¶ Statement of the

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<sup>2411</sup> Available at <[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 14 May 2012.

<sup>2412</sup> *ibid.*

<sup>2413</sup> *ibid.*

<sup>2414</sup> *ibid.*

<sup>2415</sup> *ibid.*

<sup>2416</sup> *ibid.*

Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (November 2007) UN Doc S/PV/5781 ¶ Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (May 2008) UN Doc S/PV/5898 ¶ Statement of the Representative of *Burkina Faso* to the UNSC, UNSC Verbatim Record (May 2008) UN Doc S/PV/5898 ¶ Statement of the Representative of *Bangladesh* to the UNSC, UNSC Verbatim Record (January 2009) UN Doc S/PV/6066(Res.1) ¶ Statement of the Representative of *Liechtenstein* to the UNSC, UNSC Verbatim Record (December 2009) UN Doc S/PV/6216(Res.1) ¶ Statement of the Representative of *Belgium* to the UNSC, UNSC Verbatim Record (December 2009) UN Doc S/PV/6216(Res.1) ¶ Statement of the Representative of *Sri Lanka* to the UNSC, UNSC Verbatim Record (December 2009) UN Doc S/PV/6216(Res.1) ¶ Statement of the Representative of *Sri Lanka* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Sierra Leone* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Slovakia* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of the *Democratic Republic of Korea* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Benin* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Austria* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Pakistan* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Ecuador* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Canada* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Egypt (on behalf of the Non-Aligned Movement)* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Belgium* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Croatia* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2417</sup> ¶ Statement of the Representative of *Palestine* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2418</sup> ¶ Statement of the Representative of *Kenya* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2419</sup> ¶ Statement of the Representative of *Germany* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2420</sup> ¶ Statement of the Representative of *Gambia* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2421</sup> ¶ Statement of the Representative of *Slovenia* to the UNGA (24 July 2009) UN Doc GA/10849.<sup>2422</sup>

### **(c) Statements defining RtoP Beneficiaries as “Citizens”**

Statement of the Representative of *China* to the United Nations General Assembly, ‘Informal Meeting of Plenary on the High Level Plenary Meeting of the General Assembly of September 2005’ (June 2005)<sup>2423</sup> ¶ Statement of the Representative of *Botswana* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.4 ¶ Statement of the Representative of *Poland* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of the *United Kingdom* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5476 ¶

<sup>2417</sup> UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 2380).

<sup>2418</sup> UN Press Release, ‘Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate’ (n 2378).

<sup>2419</sup> *ibid.*

<sup>2420</sup> UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 2380).

<sup>2421</sup> UN Press Release, ‘Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate’ (n 2378).

<sup>2422</sup> UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 2380).

<sup>2423</sup> Available at <[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 14 May 2012.



Statement of the Representative of *China* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5319 ¶ Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (November 2007) UN Doc S/PV/5781 ¶ Statement of the Representative of *Qatar* to the UNSC, UNSC Verbatim Record (November 2007) UN Doc S/PV/5781 ¶ Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (June 2007) UN Doc S/PV/5703 ¶ Statement of the Representative of *Panama* to the UNSC, UNSC Verbatim Record (May 2008) UN Doc S/PV/5898 ¶ Statement of the Representative of *Sri Lanka* to the UNSC, UNSC Verbatim Record (December 2009) UN Doc S/PV/6216(Res.1) ¶ Statement of the Representative of *Jamaica (on behalf of the Caribbean Community)* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Myanmar* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Nicaragua* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Ireland* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2424</sup> ¶ Statement of the Representative of *Panama* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2425</sup> ¶ Statement of the Representative of *Kazakhstan* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Bangladesh* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Chile* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *South Africa* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *China* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Canada* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Guinea Bissau* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Indonesia* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of the *Philippines* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Belgium* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Joint Statement of the Representatives of *Costa Rica and Denmark* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Norway* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2426</sup> ¶ Statement of the Representative of *Luxembourg* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2427</sup> ¶ Statement of the Representative of *Lesotho* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2428</sup> ¶ Statement of the Representative of *Sudan* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Iceland* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Romania* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2429</sup> ¶ Statement of the Representative of *San Marino* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2430</sup> ¶ Statement of the Representative of *Panama* to the UNGA (28 July 2009) UN Doc GA/10850.<sup>2431</sup>

<sup>2424</sup> UN Press Release, 'More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (n 2380).

<sup>2425</sup> UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (n 2378).

<sup>2426</sup> UN Press Release, 'More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (n 2380).

<sup>2427</sup> *ibid.*

<sup>2428</sup> *ibid.*

<sup>2429</sup> *ibid.*

<sup>2430</sup> *ibid.*

<sup>2431</sup> UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (n 2378).

#### (d) Statements defining RtoP Beneficiaries as “Peoples”

Statement of the Representative of *Estonia* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.6 ¶ Statement of the Representative of *Monaco* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.6 ¶ Statement of the Representative of *Iceland* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.6 ¶ Statement of the Representative of *Indonesia* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of *Poland* to the UNGA, UNGA Meeting Record (September 2005) UN Doc A/60/PV.7 ¶ Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (December 2005) UN Doc S/PV/5476 ¶ Statement of the Representative of the *United States* to the UNSC, UNSC Verbatim Record (June 2005) UN Doc S/PV/5209 ¶ Statement of the Representative of *Egypt* to the UNSC, UNSC Verbatim Record (January 2009) UN Doc S/PV/6066(Res.1) ¶ Statement of the Representative of *Bangladesh* to the UNSC, UNSC Verbatim Record (January 2009) UN Doc S/PV/6066(Res.1) ¶ Statement of the Representative of *Sri Lanka* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Iran* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Jamaica (on behalf of the Caribbean Community)* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Ireland* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2432</sup> ¶ Statement of the Representative of *Timor Leste* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2433</sup> ¶ Statement of the Representative of *North Korea* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Kazakhstan* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Bangladesh* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Tanzania* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *Singapore* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Chile* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Colombia* to the UNGA, UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98 ¶ Statement of the Representative of *Israel* to the UNGA, UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100 ¶ Statement of the Representative of *France* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Bosnia and Herzegovina* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Australia* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *New Zealand* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Italy* to the UNGA, UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97 ¶ Statement of the Representative of *Palestine* to the UNGA (28 July 2009) UN Doc GA/10850<sup>2434</sup> ¶ Statement of the Representative of *Venezuela* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2435</sup> ¶ Statement of the Representative of *Romania* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2436</sup> ¶ Statement of the Representative of *Mexico* to the UNGA (24 July 2009) UN Doc GA/10849<sup>2437</sup> ¶ Statement of the Representative of *Cuba* to the UNGA (24 July 2009)

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<sup>2432</sup> *ibid.*

<sup>2433</sup> UN Press Release, ‘Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate’ (n 2378).

<sup>2434</sup> *ibid.*

<sup>2435</sup> UN Press Release, ‘More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect’ (n 2380).

<sup>2436</sup> *ibid.*

<sup>2437</sup> *ibid.*

UN Doc GA/10849<sup>2438</sup> ¶ Statement of the Representative of *Peru* to the UNGA (28 July 2009) UN Doc GA/10850.<sup>2439</sup>

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<sup>2438</sup> *ibid.*

<sup>2439</sup> UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (n 2378).

# BIBLIOGRAPHY

## BOOKS

- Aba E and Hammer M, *Yes We Can? Options and Barriers to Broadening the Scope of the Responsibility to Protect to include Cases of Economic Social and Cultural Rights Abuses* (One World Trust, London 2009)
- Akehurst M and Malanczuk P (eds), *Akehurst's Modern Introduction to International Law* (7th edn Routledge, London 1997)
- Amneus D, *Responsibility to Protect and the Prevention of Genocide: A Right to Humanitarian Intervention?* (The Living History Forum, Stockholm 2008)
- Anghie A, *Imperialism, Sovereignty and the Making of International Law* (CUP, Cambridge 1995)
- Badescu C, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (Routledge, Abingdon 2011)
- Bellamy A, *Global Politics and the Responsibility to Protect: From Words to Deeds* (Routledge, Abingdon 2011)
  - *The Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press, Cambridge 2009)
  - Davies SE and Glanville L (eds), *The Responsibility to Protect and International Law* (Martinus Nijhoff, Leiden 2011)
- Bettati M and Kouchner B, *Le Devoir d'Ingérence: Peut-On les Laisser Mourir?* (Denoël, Paris 1987)
- Booth K, *The Kosovo Tragedy: The Human Rights Dimensions* (Frank Cass, London 2001)
- Caplan R, *Europe and the Recognition of New States in Yugoslavia* (CUP, Cambridge 2005)
- Chomsky N, *A New Generation Draws the Line: "Humanitarian" Intervention and the Standards of the West* (Pluto Press, London 2012)
- Cooper R and Kohler J (eds), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (Palgrave Macmillan, New York 2009)
- Cryer R (ed), *An Introduction to International Criminal Law and Procedure* (CUP, Cambridge 2007)
- Cunliffe P (ed), *Critical Perspectives on the Responsibility to Protect: Interrogating Theory and Practice* (Routledge, Abingdon 2011)
- Dallaire R, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Arrow Books, London 2004)
- Davies SE and Glanville L (eds), *Protecting the Displaced: Deepening the Responsibility to Protect* (Martinus Nijhoff, Leiden 2010)
- Deng F, *Sovereignty as Responsibility* (Brookings Institution, Washington D.C. 1995)
- Dickinson R, Katselli E, Murray C and Pederson OW (eds), *Examining Critical Perspectives on Human Rights* (CUP, Cambridge 2012)

- Evans G, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings, Washington D.C. 2008)
- Evans M (ed), *International Law* (2nd edn OUP, Oxford 2006)
- Fiott D et al, *Operationalising the Responsibility to Protect: A Contribution to the Third Pillar Approach* (The Madariaga College of Europe Foundation, Brussels 2012)
- Fohr A, *Modern Concepts of Customary International Law as a Manifestation of a Value-Based International Order* (Duncker & Humboldt, Berlin 2006)
- Genser J and Cotler I (eds) *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time* (OUP, Oxford 2012)
- Gray C, *International Law and the Use of Force*, (3rd edn OUP, Oxford 2008)
- Hampson F et al (eds), *From Reaction to Conflict Prevention: Opportunities for the UN System* (Lynne Rienner, Boulder 2001)
- Hehir A, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention* (Palgrave Macmillan, Basingstoke 2012)
- Henham R and Behrens P (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate Publishing, Aldershot 2007)
- Holt V and Berkman T, *The Impossible Mandate? Military Preparedness, The Responsibility to Protect and Modern Peace Operations* (The Henry L. Stimson Centre, Washington D.C. 2006)
- International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Research, Bibliography and Background* (International Development Research Centre, Ottawa 2001)
- International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, Ottawa 2001)
- Kemp W, Popovski V and Thakur R (eds), *Blood and Borders: The Responsibility to Protect and the Problem of the Kin-State* (UN University Press, Tokyo 2011)
- Kingsbury D, *Sri Lanka and the Responsibility to Protect: Politics, Ethnicity and Genocide* (Routledge, Abingdon 2012)
- Knight W and Egerton F (eds), *The Routledge Handbook of the Responsibility to Protect* (Routledge, Abingdon 2012)
- Krasner S, *Sovereignty: Organised Hypocrisy* (Princeton University Press, New Jersey 1999)
- Kreijen G, *State Sovereignty and International Governance* (OUP, Oxford 2002)
- Lie J, *Protection of Civilians, The Responsibility to Protect and Peace Operations* (Norwegian Centre for International Affairs, Oslo 2008)
- Lowe V, *International Law* (OUP, Oxford 2007)
- Martinez M, *National Sovereignty and International Organisations* (Kluwer Law International, The Hague 1996)
- McCormack T and Simpson GJ (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, The Hague 1997)

- Mepham D and Ramsbotham A, *Darfur: The Responsibility to Protect* (Institute for Public Policy Research, London 2006)
- Musgrave TD, *Self-Determination and National Minorities* (OUP, Oxford 1997)
- Nardin T and Williams M (eds), *Humanitarian Intervention* (New York University Press, New York 2006)
- Nollkaemper A and Hoffmann J (eds), *The Responsibility to Protect: From Principle to Practice* (Amsterdam University Press, Amsterdam 2012)
- Orford A, *International Authority and the Responsibility to Protect* (CUP, Cambridge 2011)
- Pattison J, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (OUP, Oxford 2010)
- Ratner S and Abrams J, *Accountability for Human Rights in International Law: Beyond the Nuremberg Legacy* (OUP, Oxford 1997)
- Rehman J, *International Human Rights Law* (Pearson, Harlow 2010)
- Rupesinghe K and Tishkov V, *Ethnicity and Power in the Contemporary World* (UN University Press, Tokyo 1996)
- Schabas WA, *Report: Preventing Genocide and Mass Killing: The Challenge for the United Nations*, (Minority Rights Group International, London 2006)  
-- *Genocide in International Law* (CUP, Cambridge 2000)
- Srinivasan S, *Minority Rights, Early Warning and Conflict Prevention: Lessons from Darfur* (Minority Rights Group International, London 2006)
- Steiner HJ, Alston P and Goodman R, *International Human Rights in Context* (3rd edn OUP, Oxford 2007)
- Strauss E, *The Emperor's New Clothes? The United Nations and the Implementation of the Responsibility to Protect* (Nomos, Baden Baden 2009)
- Temperley HV, *A History of the Peace Conference of Paris: Vol IV* (OUP, London 1921)  
-- *A History of the Peace Conference of Paris: Vol V* (OUP, London 1921)
- Thakur R, *The People vs. The State: Reflections on UN Authority, US Power and the Responsibility to Protect* (UN University Press, Tokyo 2011)  
-- *The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics* (Routledge, Abingdon 2011)
- Thornberry P, *International Law and the Rights of Minorities* (OUP, Oxford 1991)
- Turner N and Otsuki N, *The Responsibility to Protect Minorities and the Problem of the Kin State* (UN University Press, Tokyo 2010)
- Weber C, *Simulating Sovereignty: Intervention, the State and Symbolic Change* (CUP, Cambridge 1995)
- Weiss TG, *Humanitarian Crises and the Responsibility to Protect* (2nd edn, Rowman and Littlefield Publishers, Oxford 2005)  
-- *Humanitarian Intervention* (Polity Press, Cambridge 2007)

- Mani R and Weiss TG, *Responsibility to Protect: Cultural Perspectives in the Global South* (Routledge, Abingdon 2011)
- Weller M, *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP, Oxford 2005)
  - and Morowa A (eds), *Mechanisms for the Implementation of Minority Rights* (Council of Europe Press, Strasbourg 2005)
  - *Universal Minority Rights* (OUP, Oxford, 2007)
- Welsh J (ed), *Humanitarian Intervention and International Relations* (OUP, Oxford 2004)
- Wheeler N, *Saving Strangers: Humanitarian Intervention in International Society* (OUP, Oxford 2003)
  - *Operationalising the Responsibility to Protect: The Continuing Debate Over where Authority should be Located for the Use of Force* (Norwegian Institute for International Affairs, Oslo 2008)

## CASE LAW

- Advisory Opinion on the Legality of Kosovo's Unilateral Declaration of Independence, ICJ Reports 2010
- Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 7 March 2006 <<http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=91&code=bhy&p3=2>> accessed 28 October 2012
- Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007
- *Application Instituting Proceedings, Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia vs. Russian Federation)* 12th August 2008
- *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia vs. Russian Federation*, 15th October 2008, ICJ Reports 5
- *Barcelona Traction Light and Power Company Case, International Court of Justice*, ICJ Reports 4
- *Declaration of Judge Simma, Advisory Opinion on the Legality of Kosovo's Unilateral Declaration of Independence*, ICJ Reports 2010
- European Court of Human Rights, *Al Skeini & Others v. The United Kingdom*, 2011, Application No. 55721/07
- *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986
- *North Sea Continental Shelf, Judgment*, ICJ Reports 1969

## CIVIL SOCIETY

- Amnesty International, 'Mali: Five Months of Crisis Armed Rebellion and Military Coup' (Amnesty International Publications, London 2012) <<http://www.amnesty.org/en/library/asset/AFR37/001/2012/en/f93ab197-dd94-45b5-8e42-a3375c7747c4/afr370012012en.pdf>> accessed 6 July 2012  
 -- 'Mali's Worst Human Rights Situation in Fifty Years' (*Amnesty International*, 16 May 2012) <<http://www.amnesty.org/en/news/mali-s-worst-human-rights-situation-fifty-years-2012-05-15>> accessed 6 July 2012
- Global Centre for the Responsibility to Protect 'Meeting Summary – Fulfilling the Responsibility to Protect: Strengthening our Capacities to Halt and Prevent Mass Atrocities' (24 September 2010), 3 <<http://globalr2p.org/advocacy/index.php>> accessed 17 June 2012
- Human Rights Watch, *World Report 2005* (Human Rights Watch, United States 2005) <<http://www.hrw.org/legacy/wr2k5/darfur/index.htm>> accessed 6 January 2012  
 -- 'Ballots to Bullets: Organised Political Violence and Kenya's Crisis of Governance' (2008) Human Rights Watch Report 20 (1) (A), <<http://www.hrw.org/reports/2008/kenya0308/index.htm>> accessed 16 November 2011  
 -- 'Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive' (*Human Rights Watch*, 9 April 2011) <<http://www.hrw.org/news/2011/04/09/c-te-d-ivoire-ouattara-forces-kill-rape-civilians-during-offensive>> accessed 14 August 2011  
 -- 'Report: The Government Could Have Stopped This: Sectarian Violence and Ensuing Abuses in Burma's Arakan State' (2012) <<http://www.hrw.org/reports/2012/07/31/government-could-have-stopped>> accessed 3 August 2012
- International Coalition of the Responsibility to Protect, 'Crisis in Darfur' <<http://responsibilitytoprotect.org/index.php/crises/crisis-in-darfur>> accessed 12 August 2012  
 -- 'Crisis in Guinea' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-guinea>> accessed 12 August 2012  
 -- 'Crisis in Sudan' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-sudan>> accessed 12 August 2012  
 -- 'Crisis in Syria' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria>> accessed 12 August 2012  
 -- 'Crisis in the DRC' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-drc>> accessed 12 August 2012  
 -- 'General Debate at the Review Conference of the Rome Statute of the International Criminal Court' (June 2010) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 28 October 2012  
 -- 'The Crisis in Burma' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-burma>> accessed 12 August 2012



-- 'The Crisis in Côte d' Ivoire'

<<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-ivory-coast>> accessed 12 August 2012

-- 'The Crisis in Gaza: An RtoP Situation?'

<<http://responsibilitytoprotect.org/index.php/crises/178-other-rtop-concerns/2750-the-crisis-in-gaza>> accessed 12 August 2012

-- 'The Crisis in Libya' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya>> Last accessed 12 August 2012

-- 'The Crisis in Nigeria' <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-nigeria>> accessed 12 August 2011

-- 'The Crisis in Zimbabwe' <<http://responsibilitytoprotect.org/index.php/crises/crisis-in-zimbabwe>> accessed 10 August 2012

-- 'US Senate Resolution on Preventing Genocide and Mass Atrocities' (5 August 2010)

<<http://www.responsibilitytoprotect.org/index.php/component/content/article/134-americas/2912-us-senate-resolution-dav10643-on-preventing-genocide-and-mass-atrocities->> accessed 14 July 2012

- International Crisis Group, 'Russia vs. Georgia: The Fall Out' (2008), Europe Report No. 195 <[http://www.crisisgroup.org/~../195\\_russia\\_vs\\_georgia\\_\\_\\_the\\_fallout.pdf](http://www.crisisgroup.org/~../195_russia_vs_georgia___the_fallout.pdf)> accessed 12 November 2012
- Minority Rights Group International, 'Minority Rights and Development: Overcoming Exclusion, Discrimination and Poverty' (Paper Submitted to the UN Working Group on Minorities, 29 May 2002) <<http://www.minorityrights.org/810/international-statements/minority-rights-and-development-overcoming-exclusion-discrimination-and-poverty.html>> accessed 12 May 2012
- World Federalist Movement, 'State-by-State Positions on the Responsibility to Protect' (11 August 2005) <<http://www.responsibilitytoprotect.org/index.php/document-archive/civilsociety?view=fjrelated&id=2411>> accessed 11 January 2011

## CONFERENCE PAPERS/LECTURES

- Alvarez J, 'The Schizophrenias of R2P' (Panel Presentation at the Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, The Hague, 30 June 2007) <<http://www.asil.org/pdfs/r2pPanel.pdf>> accessed 10 August 2012
- Luck EC, 'The Normative Journey: The Evolution of the RtoP Concept' (Keynote address, European Science Foundation Conference 'The Responsibility to Protect from Principle to Practice' Linköping, June 2010)
- Miller D, 'The Responsibility to Protect Human Rights' (Memo for the Workshop on Global Governance, Princeton University, February 2006)

<[http://www.princeton.edu/~pcglobal/conferences/.../Session6\\_Miller.pdf](http://www.princeton.edu/~pcglobal/conferences/.../Session6_Miller.pdf)> accessed 10 October 2010

- Nouwen S, 'RtoP and Complementarity: Critical Lessons from the Practice of the ICC' (paper presented at the European Science Foundation 'The Responsibility to Protect: From Principle to Practice' conference, 8-12 June 2010, Linköping, Sweden)
- Wheeler N, 'A Victory for Common Humanity? The Responsibility to Protect After the 2005 World Summit' (Paper presented at 'The UN at Sixty: Celebration or Wake?' conference, University of Toronto, 6-7 October 2005)  
<<http://cadair.aber.ac.uk/dspace/bitstream/2160/1971/1/a%20victory%20for%20common%20humanity%20Wheeler.pdf>> accessed 12 May 2012

## JOURNALS

- Abi-Saab G, 'Whither the International Community?' (1998) 9 *European Journal of International Law* 248
- Akhavan P, 'The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond' (1996) 18 *Human Rights Quarterly* 259  
-- 'Preventing Genocide: Measuring Success by What Does Not Happen' (2011) 22 (1) *Criminal Law Forum* 1
- Alvarez JE, 'Crimes of States/Crimes of Hate: Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 365
- Anonymous, 'Human Rights in Peace Negotiations' (1996) 18 *Human Rights Quarterly* 249
- Arbour L, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 *Review of International Studies* 445
- Bannon A, 'The Responsibility to Protect and the Question of Unilateralism' (2006) 115 *Yale Law Journal* 1157
- Bellamy A, 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq' (2005) 19 *Ethics & International Affairs Journal* 31  
-- 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (2006) 20 (2) *Ethics and International Affairs Journal* 143  
-- 'Conflict Prevention and the Responsibility to Protect' (2008) 14 (2) *Global Governance* 135  
-- 'The Responsibility to Protect and the Problem of Military Intervention' (2008) 84 (4) *Ethics and International Affairs* 615  
-- 'Realising the Responsibility to Protect' (2009) 10 (2) *International Studies Perspectives* 111  
-- 'The Responsibility to Protect: Five Years On' (2010) 2 *Ethics and International Affairs* 143  
-- 'Libya and the Responsibility to Protect: The Exception and the Norm' (2011) 25 (3) *Ethics & International Affairs* 263

- and Williams PD, 'The New Politics of Protection? Côte d'Ivoire, Libya, and the Responsibility to Protect' (2011) 87 (4) *International Affairs* 825
- and Williams PD, 'On the Limits of Moral Hazard: The 'Responsibility to Protect', Armed Conflict and Mass Atrocities' (2012) 18 (3) *European Journal of International Relations* 539
- Belloni R, 'The Tragedy of Darfur and the Limits of the Responsibility to Protect' (2006) 5 (4) *Ethnopolitics* 326
- Bennoun K, 'Sovereignty vs. Suffering: Re-Examining Sovereignty and Human Rights through the Lens of Iraq' (2002) 13 (1) *European Journal of International Law* 243
- Bird A, 'Third State Responsibility for Human Rights Violations' (2010) 21 (4) *European Journal of International Law* 883
- Bond J and Sherret L, 'Mapping Gender and the Responsibility to Protect: Seeking Intersections, Finding Parallels' (2012) 4 (2) *Global Responsibility to Protect* 133
- Borgen C, 'Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's "Frozen Conflicts"' (2007) 9 *Oregon Review of International Law* 477
- Boyle A, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 (4) *International and Comparative Law Quarterly* 901
- Breau S, 'The Impact of the Responsibility to Protect on Peacekeeping' (2007) 11 (3) *Journal of Conflict & Security Law* 429
- Brune J, 'The Responsibility to Protect and the Use of Force: Building Legality?' (2010) 2 *Global Responsibility to Protect* 191
- Capie D, 'The Responsibility to Protect Norm in Southeast Asia: Framing, Resistance and the Localisation Myth' (2012) 25 (1) *Pacific Review* 75
- Cassese A, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' (2007) 5 (4) *Journal of International Criminal Justice* 875
- Chandler D, 'The Paradox of the Responsibility to Protect' (2010) 45 (1) *Cooperation and Conflict* 128
- 'The Responsibility to Protect: Imposing the Liberal Peace?' (2004) 11 (1) *International Peacekeeping* 59
- Charlesworth H, 'Feminist Reflections on the Responsibility to Protect' (2010) 2 (3) *Global Responsibility to Protect* 232
- Chesterman S, 'Leading from Behind: The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya' (2011) 25 (3) *Ethics & International Affairs* 279
- Chinkin C, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International Comparative Law Quarterly* 850
- Cholewinski R, 'State Duty Towards Ethnic Minorities: Positive or Negative?' (1988) 10 (3) *Human Rights Quarterly* 344
- Claes J, 'Protecting Civilians from Mass Atrocities: Meeting the Challenge of R2P Rejectionism' (2012) 4 (1) *Global Responsibility to Protect* 67
- Cohen R, 'Strengthening Protection of IDP's: The UN's Role' (2006) 7 (1) *Georgetown Journal of International Affairs* 101

- 'Reconciling RtoP with IDP Protection' (2010) 2 Global Responsibility to Protect 15
- Contarino M, Negron-Gonzales M and Mason KT, 'The International Criminal Court and Consolidation of the Responsibility to Protect as an International Norm' (2012) 4 (3) Global Responsibility to Protect 275
- Cutts N, 'Enemies through the Gates: Russia's Violations of International Law in the Georgia/Abkhazia Conflict' (2007) 40 Case Western Reserve Journal of International Law 281
- Dastoor NF, 'The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect' (2009) 22 Harvard Human Rights Journal 25
- Davies SE and Teitt S, 'Engendering the Responsibility to Protect: Women and the Prevention of Mass Atrocities' (2012) 4 (2) Global Responsibility to Protect 198
- De Waal A, 'Darfur and the Failure of the Responsibility to Protect' (2007) 83 (6) Ethics and International Affairs 1039
- Deng F and Cohen R, 'Exodus within Borders: The Uprooted Who Never Left Home' (1998) 77 (4) Foreign Affairs 12
- Dharmapuri S, 'Implementing UN Security Resolution 1325: Putting the Responsibility to Protect into Practice' (2012) 4 (2) Global Responsibility to Protect 241
- Dumberry P, 'New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement' (2006) 17 (3) European Journal of International Law 605
- Elias O, 'The Relationship Between General and Particular Customary International Law' (1996) 8 African Journal of International & Comparative Law 67
- El Zeidy M, 'The Gravity Threshold under the Statute of the International Criminal Court' (2008) 19 Criminal Law Forum 35
- Engle K, 'Calling in the Troops: The Uneasy Relationship between Women's Rights, Human Rights and Humanitarian Intervention' (2007) 20 Harvard Human Rights Journal 189
- Evans G, 'From Humanitarian Intervention to the Responsibility to Protect' (2006-2007) 24 Wisconsin International Law Journal 703
- 'Russia, Georgia and the Responsibility to Protect' (2009) 2 (1) Amsterdam Law Forum 25  
<<http://ojs.ubvu.vu.nl/alf/article/view/58/115>> accessed 12 May 2012
- Feinstein L, 'Darfur and Beyond: What is Needed to Prevent Mass Atrocities' (2007) 22 Council on Foreign Relations 1
- Geissler N, 'The International Protection of Internally Displaced Persons' (1999) 11 (3) International Journal of Refugee Law 451
- Glanville L, 'The Responsibility to Protect Beyond Borders' (2012) 12 (1) Human Rights Law Review 1
- Gray C, 'A Crisis of Legitimacy for the UN Collective Security System?' (2007) 56 (1) International & Comparative Law Quarterly 157
- Grono N, 'Briefing - Darfur: The International Community's Failure to Protect' (2006) 105 (421) African Affairs 621
- Guterres A, 'Millions Uprooted: Saving Refugees and the Displaced' (2008) 87 (5) Foreign

- Hakimi M, 'State Bystander Responsibility' (2010) 21 (2) *European Journal of International Law* 341
- Hamilton R, 'The Responsibility to Protect: From Document to Doctrine - But What of Implementation?' (2006) 19 *Harvard Human Rights Journal* 289
- Hannum, H, 'The Responsibility to Protect: Paradigm or Pastiche?' (2009) 60 (2) *Northern Ireland Legal Quarterly* 135
- Harff B, 'No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Mass Murder since 1955' (2003) 97 (1) *American Political Science Review* 57
- Harhoff F, 'Unauthorised Humanitarian Interventions: Armed Violence in the Name of Humanity?' (2001) 70 *Nordic Journal of International Law* 65
- Henderson C, 'The 2010 United States National Security Strategy and the Obama Doctrine of Necessary Force' (2010) 15 (3) *Journal of Conflict & Security Law* 403
- Higgins R, 'The United Nations and Lawmaking: The Political Organs' (1970) 64 *American Society of International Law Proceedings* 37
- Hubert D and Blätter A, 'The Responsibility to Protect as International Crimes Prevention' (2012) 4 (1) *Global Responsibility to Protect* 33
- Jackson Preece J, 'Minority Rights in Europe: From Westphalia to Helsinki' (1997) 23 *Review of International Studies* 75
- Johnson C, 'The Use and Abuse of Minority Rights: Assessing Past and Future EU Policies toward Accession Countries of Central, Eastern and South-Eastern Europe' (2006) 13 *International Journal of Minority and Group Rights* 27
- Kalkman M, 'Responsibility to Protect: A Bow Without an Arrow' (2009) 5 *Cambridge Student Law Review* 75
- Karlsrud J and Solhjell R, 'Gender-Sensitive Protection and the Responsibility to Prevent: Lessons from Chad' (2012) 4 (2) *Global Responsibility to Protect* 223
- Koko S, 'Whose Responsibility to Protect? Reflections on the Dynamics of an 'Abandoned Disorder' in Somalia' (2007) 16 (3) *African Security Review* 2
- Kolsto P, 'Living with Non-Recognition: State and Nation Building in South Caucasian Quasi-States (2008) 60 (3) *Europe-Asia Studies* 483
- Kress C, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice* 1179
- Kritsiosis D, 'Imagining the International Community' (2002) 13 (4) *European Journal of International Law* 961
- Kuperman AJ, 'Humanitarian Hazard: Revisiting Doctrines of Intervention' (2004) 66 *Harvard International Review* 64
- 'Suicidal Rebellions and the Moral Hazard of Humanitarian Intervention' (2005) 4 (2) *Ethnopolitics* 149
- 'The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans' (2008) 52 *International Studies Quarterly* 49

- 'Rethinking the Responsibility to Protect' (Winter/Spring 2009) *Whitehead Journal of Diplomacy and International Relations* 33
- Kymlicka W, 'The Internationalisation of Minority Rights' (2008) 6 (1) *International Journal of Constitutional Law* 1
  - Levitt J, 'The Responsibility to Protect: A Beaver without a Dam?' (2003-2004) 25 *Michigan Journal of International Law* 153
  - Lu C, 'Humanitarian Intervention: Moral Ambition and Political Constraints' (2007) 62 *International Journal* 942
  - Luck EC, 'The Responsibility to Protect: The First Decade' (2011) 3 *Global Responsibility to Protect* 387
  - Matheson M, 'United Nations Governance of Postconflict Societies' (2001) 95 *American Journal of International Law* 76
  - McLachlan-Bent A and Langmore J, 'A Crime Against Humanity? Implications and Prospects of the Responsibility to Protect in the Wake of Cyclone Nargis' (2011) 3 *Global Responsibility to Protect* 37
  - Martin S, 'Forced Migration, the Refugee Regime and the Responsibility to Protect' (2010) 2 *Global Responsibility to Protect* 38
  - Matthews M, 'Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur' (2008) 31 *Boston College International and Comparative Law Review* 137
  - McCarthur J, 'A Responsibility to Rethink? Challenging Paradigms in Human Security' (2008) 63 *International Journal* 422
  - McClean E, 'The Responsibility to Protect: The Role of International Human Rights Law' (2008) 13 (1) *Journal of Conflict and Security Law* 123
  - Megret F, 'Beyond the 'Salvation' Paradigm: Responsibility to Protect (Others) vs. the Power of Protecting Oneself' (2009) 40 *Security Dialogue* 575
  - Mooney E, 'Something Old, Something New, Something Borrowed ... Something Blue? The Protection Potential of a Marriage of Concepts between RtoP and IDP Protection' (2010) 2 *Global Responsibility to Protect* 60
  - Murphy S, 'Criminalising Humanitarian Intervention' (2009) 41 *Case Western Reserve Journal of International Law* 341
  - Nasu H, 'Operationalising the Responsibility to Protect and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict' (2009) 14 (2) *Journal of Conflict and Security Law* 20
  - O'Brien P, 'Responsibility to Protect' (2008) 20 *International Journal of Refugee Law* 710
  - Odello M, 'Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers' (2010) 15 (2) *Journal of Conflict and Security Law* 347
  - Oman N, 'The 'Responsibility to Prevent': A Remit for Intervention?' (2009) 22 *Canadian Journal of Law & Jurisprudence* 355

- Orchard P, 'Review Article: The Evolution of the Responsibility to Protect: At a Crossroads?' (2012) 88 (2) *International Affairs* 377
- Orford A, 'Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect' (2008-2009) 30 *Michigan Journal of International Law* 981  
-- 'From Promise to Practice? The Legal Significance of the Responsibility to Protect Concept' (2011) 3 *Global Responsibility to Protect* 400
- Pace W and Deller N, 'Preventing Future Genocides: An International Responsibility to Protect' (2005) 36 (4) *World Order* 15
- Pattison J, 'Legitimacy and Humanitarian Intervention: Who Should Intervene?' (2008) 12 (3) *International Journal of Human Rights* 395  
-- 'Humanitarian Intervention, the Responsibility to Protect and Jus in Bello' (2009) 1 *Global Responsibility to Protect* 364  
-- 'The Ethics of Humanitarian Intervention in Libya' (2011) 25 (3) *Ethics & International Affairs* 271  
-- 'The RtoP and Responsibility while Protecting: The Secretary-General's Timely and Decisive Report on Timely and Decisive Responses' (University of Denver Human Rights and Human Welfare Online Journal, 31 October 2012)  
<<http://www.du.edu/korbel/hrhw/roundtable/2012/panel-b/10-2012/pattison-2012a.html>>  
accessed 4 November 2012
- Payandeh M, 'With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking' (2010) 35 *Yale Journal of International Law* 469
- Peters A, 'Humanity as the Alpha and Omega of Sovereignty' (2009) 20 (3) *European Journal of International Law* 513
- Quane H, 'Rights in Conflict? The Rationale and Implications of Using Human Rights in Conflict Prevention Strategies' (2007) 47 *Virginia Journal of International Law* 463
- Rastan R, 'What is a Case for the Purpose of the Rome Statute?' (2008) 19 *Criminal Law Forum* 435
- Ratner S, 'Does International Law Matter In Preventing Ethnic Conflict?' (2000) 32 (3) *New York University Journal of International Law and Politics* 591
- Roberts A, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law* 757
- Roff HM, 'A Provisional Duty of Humanitarian Intervention' (2011) 3 (2) *Global Responsibility to Protect* 152
- Ruys T, 'The "Protection of Nationals" Doctrine Revisited' (2008) 13 (2) *Journal of Conflict & Security Law* 233
- Rytter J, 'Humanitarian Intervention without the Security Council: From San Francisco to Kosovo - and Beyond' (2001) 70 *Nordic J. Int'l L.* 121
- Sarkin J, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organisations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian

Intervention and the Responsibility to Protect' (2009) 53 (1) Journal of African Law 1

-- and Fowler C 'The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to be Learned from the Role of the International Community and the Media During the Rwandan Genocide and the Conflict in the Former Yugoslavia' (2010) 33 (1) Suffolk Transnational Law Review 35

-- 'Is the Responsibility to Protect an Accepted Norm of International Law in the Post-Libya Era? How its Third Pillar Ought to Be Applied' (2012) 1 Groningen Journal of International Law 11

- Schabas WA, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 Journal of International Criminal Justice 731
- 'State Policy as an Element of International Crimes' (2008) 98 (3) Journal of Criminal Law and Criminology 953
- Scheffer D, 'Atrocity Crimes Framing the Responsibility to Protect' (2007-2009) 40 Case Western Reserve Journal of International Law 111
- Schott J, 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency' (2007) 6 (1) Northwestern University Journal of International Human Rights Law 24
- Shaffer G and Pollack M, 'Hard Versus Soft Law in International Security' (2011) 52 Boston College Law Review 1147
- Sharma S, 'Toward a Global Responsibility to Protect: Setbacks on the Path to Implementation' (2010) 16 Global Governance 121
- Shawki N, 'Responsibility to Protect: The Evolution of an International Norm' (2011) 3 (2) Global Responsibility to Protect 172
- Shelton D, 'The UN Human Rights Committee's Decisions' (2004-2005) 12 (2) Human Rights Dialogue  
<[http://www.carnegiecouncil.org/resources/publications/dialogue/2\\_12/section\\_3/5151.html](http://www.carnegiecouncil.org/resources/publications/dialogue/2_12/section_3/5151.html)  
> accessed 14 May 2012
- Skjelsbaek I, 'Responsibility to Protect or Prevent? Victims and Perpetrators of Sexual Violence Crimes in Armed Conflicts' (2012) 4 (2) Global Responsibility to Protect 154
- Slaughter AM, 'Security, Solidarity and Sovereignty: The Grand Themes of UN Reform' (2005) 99 (3) American Journal of International Law 619
- Slim H, 'Values Versus Power: Responsible Sovereignty as Struggle in Zimbabwe' (2010) 2 Global Responsibility to Protect 155
- Spiermann O, 'Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens' (2002) 71 Nordic Journal of International Law 523
- Stahn C, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 (1) American Journal of International Law 99
- 'Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility' (2012) 10 (2) Journal of International Criminal Justice 325



- Stamnes E, ‘‘Speaking RtoP’ and the Prevention of Mass Atrocities’ (2009) 1 (1) Global Responsibility to Protect 70
  - ‘The Responsibility to Protect: Integrating Gender Perspectives into Policies and Practices’ (2012) 4 (2) Global Responsibility to Protect 172
- Talmon S, ‘The Responsibility of Outside Powers for Acts of Secessionist Entities’ (2009) 58 International and Comparative Law Quarterly 413
  - ‘Recognition of the Libyan Transitional Council’ (2011) 15 (16) American Society of International Law Insights <<http://www.asil.org/insights110616.cfm>> accessed 7 August 2012
- Thakur R, ‘In Defence of the Responsibility to Protect’ (2003) 7 (3) International Journal of Human Rights 160
  - ‘Behind the Headlines: Iraq and the Responsibility to Protect’ (2004) 62 (1) Canadian Institute of International Affairs 1
  - and Popovski V, ‘The Responsibility to Protect and Prosecute: The Parallel Erosion of Sovereignty and Impunity’ (2007) 1 The Global Community Yearbook of International Law and Jurisprudence 39
  - ‘Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism’ (2011) 7 (4) Security Challenges 13 <<http://www.securitychallenges.org.au/ArticlePages/vol7no4Thakur.html>> accessed 2 February 2012
- The Editors, ‘Special Issue for GRtoP: Protecting IDPs and Refugees’ (2010) 2 Global Responsibility to Protect 5
- Thibault JF, ‘Military Intervention and the Indeterminacy of the Responsibility to Protect’ (2008) 7 Human Security Journal 8
- Thio L, ‘Developing a “Peace and Security” Approach Towards Minorities’ Problems’ (2003) 52 (1) International and Comparative Law Quarterly 115
- Thornberry P, ‘Is There A Phoenix In The Ashes? International Law and Minority Rights’ (1980) 15 Texas International Law Journal 421
  - ‘Self-Determination, Minorities, Human Rights: A Review of International Instruments’ (1989) 38 (4) International and Comparative Law Quarterly 867
- Tiewa L, ‘China and the Responsibility to Protect: Maintenance and Change for its Policy of Intervention’ (2012) 25 (1) The Pacific Review 153
- Tsagourias N, ‘Consent, Neutrality / Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension’ (2007) 11 (3) Journal of Conflict and Security Law 465
- Uvin P, ‘From the Right to Development to the Rights-Based Approach: How Human Rights Entered Development’ (2007) 17 (4/5) Development in Practice 597
- Waters C, ‘Law in Places that Don’t Exist’ (2006) 34 Denver Journal of International Law & Policy 401
- Weiss TG, ‘RtoP Alive and Well After Libya’ (2011) 25 (3) Ethics & International Affairs 287

- MacFarlane NS, Thielking CJ and Weiss TG, 'The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?' (2004) 25 (5) *Third World Quarterly* 977
- Mani R and Weiss TG, 'RtoP's Missing Link, Culture' (2011) 3 *Global Responsibility to Protect* 451
- Welsh J, 'Implementing the Responsibility to Protect: Where Expectation Meets Reality' (2010) 24 (4) *Ethics & International Affairs* 415
  - and Banda M, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' (2010) 2 *Global Responsibility to Protect* 213
  - 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP' (2011) 25 (3) *Ethics & International Affairs* 255
- Wheeler N, 'Legitimizing Humanitarian Intervention: Principles and Procedures' (2001) 2 *Melbourne Journal of International Law* 1
  - and Egerton F, 'The Responsibility to Protect: 'Precious Commitment' or a Promise Unfulfilled?' (2009) 1 *Global Responsibility to Protect* 114
- White N, 'The Legality of Bombing in the Name of Humanity' (2000) 5 (1) *Journal of Conflict & Security Law* 27
- Williams I, 'Writing the Wrongs of Past Interventions: A Review of the International Commission on Intervention and State Sovereignty' (2002) 6 (3) *International Journal of Human Rights* 103
- Wippman D, 'The Evolution and Implementation of Minority Rights' (1997-1998) 66 *Fordham Law Review* 597
- Wong J, 'Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism' (2009) 84 (2) *Tulane Law Review* 219
- Yannis A, 'The Concept of Suspended Sovereignty in International Law and its Implications in International Politics' (2002) 13 (5) *European Journal of International Law* 1037

## NATIONAL BODIES

- Acting Representative of the United States to the UNGA, 'US Proposals for UN Reform' (22 June 2005) <[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 14 May 2012
- Australian Government Department of Defence, 'Defending Australia in the Asia-Pacific Century: Force 2030' (2009) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 10 October 2011
- Brown A, 'Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?' (2008) House of Commons Research Paper 08/55
- Farnesina Ministry of Foreign Affairs, 'Focus-Libya: Frattini, the NTC is Libya's Only Interlocutor' (4 April 2011) <[http://www.esteri.it/MAE/EN/Sala\\_Stampa/ArchivioNotizie/Approfondimenti/2011/04/20110404\\_FocusLibia\\_frattini\\_Cnt.htm](http://www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Approfondimenti/2011/04/20110404_FocusLibia_frattini_Cnt.htm)> accessed 7 August 2012

- Federal Ministry of Defence, ‘White Paper 2006 on German Security Policy and the Future of the Bundeswehr’ (2006) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 10 October 2011
- High-Level Forum on the Responsibility to Protect (28 August 2009) <<http://www.responsibilitytoprotect.org/index.php/component/content/article/133-europe/2526-finland-high-level-forum-on-rtop-explores-how-to-take-the-norm-forward>> accessed: 10 October 2011
- International Crimes Act 2008 (Act No. 16 of 2008, entry into force 9 January 2009) [Kenya National Legislation]
- “Interview by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC” (*Ministry of Foreign Affairs of the Russian Federation*, Moscow, 9 August 2008) <[www.ln.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/f87a3fb7a7f669ebc32574a100262597?OpenDocument](http://www.ln.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/f87a3fb7a7f669ebc32574a100262597?OpenDocument)> accessed 11 May 2012.
- Joint Press Release by the Governments of Australia, Costa Rica, Denmark and Ghana regarding Second Annual Meeting of the Network of National RtoP Focal Points (29 September 2012) <<http://us4.campaign-archive2.com/?u=1fbfaa1c8b7e823de28eb944d&id=d1a7ca889c&e=c591ff507e>> accessed 27 October 2012
- Joint Press Release by the Governments of Botswana, Brazil, Denmark and the Netherlands, ‘Ministerial Meeting on the Responsibility to Protect: Deepening our Commitment to Mass Atrocity Prevention’ (28 September 2012) <<http://us4.campaignarchive1.com/?u=1fbfaa1c8b7e823de28eb944d&id=42f9103b88&e=c591ff507e>> accessed 10 October 2012
- Joint Press Statement by the Ministers of Foreign Affairs of Ghana and Denmark (27 September 2010) <<http://www.um.dk/da/servicemenu/Nyheder/ForsideNyheder/PRESSEMEDDELELSE>> accessed 23 November 2010
- Local Coordination Committees of Syria, ‘Spain Considers the SNC the Representative of the Syrian People’ (25 November 2011) <<http://www.lccsyria.org/2807>> accessed 7 August 2012
- Ministry of Foreign Affairs of the Czech Republic, *Security Strategy of the Czech Republic 2011* <[http://www.army.cz/images/id\\_8001\\_9000/8503/Czech\\_Security\\_Strategy\\_2011.pdf](http://www.army.cz/images/id_8001_9000/8503/Czech_Security_Strategy_2011.pdf)> accessed 28 October 2012
- National Transitional Council, ‘A Vision of a Democratic Libya’ <[www.ntclibya.org/english/libya/](http://www.ntclibya.org/english/libya/)> accessed 12 July 2012.  
-- ‘International Recognition’ <<http://www.ntclibya.com/InnerPage.aspx?SSID=6&ParentID=3&LangID=1>> accessed 14 August 2011

-- 'Update on the Nafusa Mountain Crisis' (19 May 2011)

<<http://www.ntclibya.com/NewsDetail.aspx?NewsID=65&SSID=13&ParentID=11&LangID=1&Type=2>> accessed 9 August 2011

- Norwegian Ministry of Foreign Affairs, *Norway's Humanitarian Policy* (Report No. 40 to the Storting, 2008-2009) 28 <<http://www.regjeringen.no/en/dep/ud/documents/propositions-and-reports/reports-to-the-storting/2008-2009/report-no-40-2008-2009-to-the-storting.html?id=577646>> accessed 24 October 2012
- Norwegian Ministry of Foreign Affairs, *Climate, Conflict and Capital: Norwegian Development Policy Adapting to Change* (Report No. 13 to the Storting, 2008-2009) 68 <<http://www.regjeringen.no/en/dep/ud/documents/propositions-and-reports/reports-to-the-storting/2008-2009/report-no-13-2008-2009-to-the-storting.html?id=552810>> accessed 24 October 2012
- Presidency de la Republique, 'The French White Paper on Defence and National Security' (June 2008) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 10 October 2011.
- Statement of Ed Miliband, House of Commons Debate 21 March 2011, volume 525, column 716
- Syrian National Council, 'Syrian National Council Worldwide' <<http://www.syriancouncil.org/en/snc-worldwide/snc-map.html>> accessed 12 May 2012.  
-- 'The Syrian National Council Meets with the French Minister of Foreign Affairs and the EU High Representative of Foreign Affairs' (24 November 2011) <<http://www.syriancouncil.org/en/press-releases/item/546-the-syrian-national-council-meets-with-the-french-minister-of-foreign-affairs-and-the-eu-high-representative-of-foreign-affairs.html>> accessed 12 May 2012.  
-- 'National Covenant for a New Syria' (27 March 2012) <[www.syriancouncil.org/en/issues/item/618-national-covenant-for-a-new-syria.html](http://www.syriancouncil.org/en/issues/item/618-national-covenant-for-a-new-syria.html)> accessed 12 July 2012.  
-- 'SNC Welcomes EU's Recognition of the SNC' (28 February 2012) <<http://www.syriancouncil.org/en/press-releases/item/588-snc-welcomes-eu's-recognition-of-the-snc.html>> accessed 12 May 2012.
- The President's Office Republic of Maldives, 'Maldives Recognises Libyan National Council as Sole Representative of the Libyan People' (3 April 2011) <<http://www.presidencymaldives.gov.mv/Index.aspx?lid=11&dcid=5071>> accessed 7 August 2012
- The Truth, Justice and Reconciliation Commission of Kenya, 'Goals and Objectives' <[http://www.tjrkenya.org/index.php?option=com\\_content&view=article&id=94&Itemid=124](http://www.tjrkenya.org/index.php?option=com_content&view=article&id=94&Itemid=124)> accessed 16 June 2012
- The Truth, Justice and Reconciliation Commission of Kenya, 'Mandate and Activities' <[http://www.tjrkenya.org/index.php?option=com\\_content&view=article&id=94&Itemid=124](http://www.tjrkenya.org/index.php?option=com_content&view=article&id=94&Itemid=124)> accessed 16 June 2012

- Transitional Interim National Council of Libya, 'Founding Statement' (5 March 2011) <<http://ntclibya.org/english/founding-statement-of-the-interim-transitional-national-council/>> accessed 25 March 2011.
- United Kingdom Cabinet Office, 'The National Security Strategy of the United Kingdom: Security in an Interdependent World' (March 2008) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 10 October 2011
- UK Foreign Commonwealth Office, 'Libya' <<http://www.fco.gov.uk/en/global-issues/mena/libya/>> accessed 14 August 2011
  - 'UK Provides Equipment to the National Transitional Council in Libya' (30 June 2011) <<http://www.fco.gov.uk/en/news/latest-news/?view=PressS&id=624285882>> accessed 14 August 2011
  - 'Libya Contact Group Meeting Concludes' (15 July 2011) <<http://www.fco.gov.uk/en/news/latest-news/?view=News&id=631324382>> accessed 14 August 2011
  - 'Foreign Secretary: "We Have to Intensify Pressure on Syria"' (24 February 2012) <<http://www.fco.gov.uk/en/news/latest-news/?id=734211682&view=News>> accessed 12 May 2012
- UN: Responsibility to Protect' HL Debate 30 June 2009, vol 712, cols 192-195
- United States, 'National Security Strategy' (May 2010) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed: 10 October 2011.
- United States Senate Concurrent Resolution (11th Congress, 2nd Session, 2010) Res DAV10643
- White House Office of the Press Secretary, 'Creation of an Interagency Atrocities Prevention Board and Corresponding Interagency Review' (4 August 2011) Presidential Study Directive PSD-10
  - 'Executive Order: Syria Human Rights Abuses' (29 April 2011) <<http://www.whitehouse.gov/the-press-office/2011/04/29/fact-sheet-executive-order-syria-human-rights-abuses>> accessed 18 July 2012
  - 'Executive Order 13573: Blocking Property of Senior Officials of the Government of Syria' (18 May 2011) <<http://www.whitehouse.gov/the-press-office/2011/05/18/executive-order-blocking-property-senior-officials-government-syria>> accessed 5 January 2012
  - 'Executive Order 13582: Blocking Property of the Government of Syria and Prohibiting Certain Transactions with respect to Syria' (18 August 2011) <<http://www.whitehouse.gov/the-press-office/2011/08/18/executive-order-13582-blocking-property-government-syria-and-prohibiting>> accessed 5 January 2012
  - 'Executive Orders, Sanctions and other Financial Actions' (18 August 2011) <<http://www.whitehouse.gov/the-press-office/2011/08/18/fact-sheet-syria>> accessed 5 January 2012

## NEWSPAPER ARTICLES / ADDITIONAL ONLINE SOURCES

- Aaronovitch D, 'Remember Bosnia: Seedbed of Radical Islam' *The Times* (London, 1 June 2012)  
<<http://www.thetimes.co.uk/tto/opinion/columnists/davidaaronovitch/article3431388.ece>>  
accessed 9 August 2012
- Al Schalchi H, 'Fighters Want to Try Gaddafi Son: Libyan Lawyer' (*Reuters*, Tripoli, 11 April 2012) <<http://www.reuters.com/article/2012/04/11/us-libya-icc-idUSBRE83A1BL20120411>> accessed 16 June 2012
- Annan K, 'Two Concepts of Sovereignty' *The Economist* (New York, 18 September 1999)  
<<http://www.economist.com/node/324795>> accessed 10 October 2012
- 'Arab League Suspends Syria Mission' *The Guardian* (London, 28 January 2012)  
<<http://www.guardian.co.uk/world/2012/jan/28/arab-league-suspends-syria-monitoring>>  
accessed 12 July 2012
- Arbour L, 'For Justice and Civilians, Don't Rule Out Regime Change' *The Globe and Mail* (Toronto, 26 June 2012) <<http://www.theglobeandmail.com/commentary/for-justice-and-civilians-dont-rule-out-regime-change/article4372211/>> accessed 12 July 2012
- Bellamy A, 'The Conflict in Sri Lanka and the Responsibility to Protect' (*e-International Relations*, 1 May 2009) <<http://www.e-ir.info/2009/05/01/the-conflict-in-sri-lanka-and-the-responsibility-to-protect/>> accessed 10 October 2010  
-- 'The Responsibility to Protect and the Problem of Regime Change' (*e-International Relations*, 27 September 2011) <[www.e-ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change/](http://www.e-ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change/)> accessed 12 July 2012  
-- and Dunne T, 'Syria: RtoP on Trial' (*Lowy Institute for International Policy: The Interpreter*, 5 June 2012) <<http://www.lowyinterpreter.org/post/2012/06/05/Syria-RtoP-on-trial.aspx>> accessed 14 July 2012  
-- 'Stopping Genocide and Mass Atrocities: The Problem of Regime Change' (*Protection Gateway*, 6 July 2012) <<http://protectiongateway.com/2012/07/06/stopping-genocide-and-mass-atrocities-the-problem-of-regime-change/>> accessed 12 July 2012
- Booth R, 'Arming Libya Rebels Not Allowed by UN Resolutions, Legal Experts Warn US' *The Guardian* (London, 30 March 2011)  
<<http://www.guardian.co.uk/world/2011/mar/30/arming-libya-rebels-america-warned>>  
accessed 16 June 2011
- 'Both Parties Guilty in Houla Massacre - Lavrov' (*Russia Today*, 28 May 2012)  
<<http://www.rt.com/news/peace-plan-syria-regime-374/>> accessed 30 May 2012
- 'Britain Expels Gaddafi's Embassy Staff' (*Sky News*, London, 27 July 2011)  
<<http://news.sky.com/home/uk-news/article/16038369>> accessed 14 August 2011
- Claes J, 'Obama Announces Formation of the Atrocities Prevention Board' (*United States Institute of Peace*, 23 April 2012) <<http://www.usip.org/publications/obama-announces-formation-the-atrocities-prevention-board>> accessed 14 July 2012

- CNN Wire Staff, 'Dozens of Defecting Soldiers Executed, Activists Say' (*CNN*, 3 March 2012) <<http://edition.cnn.com/2012/03/03/world/meast/syria-unrest/index.html>> accessed 14 May 2012
- 'David Cameron: Libya Action is Necessary, Legal and Right' *The Telegraph* (London, 20 March 2011) <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8393478/David-Cameron-Libya-action-is-necessary-legal-and-right.html>> accessed 10 March 2012
- de Carbonnel A, 'Medvedev Says Russia Worried over Use of Force in Libya' (*Reuters*, Moscow, 22 March 2011) <<http://uk.reuters.com/article/2011/03/22/uk-libya-russia-medvedev-gates-idUKTRE72L5GI20110322>> accessed 29 March 2011
- Dunne T, 'RtoP, Libya and the Myth of Regime Change' (*Lowy Institute for International Policy: The Interpreter*, 5 September 2012) <<http://www.lowyinterpreter.org/post/2012/09/05/RtoP-Libya-and-the-myth-of-regime-change.aspx>> accessed 4 October 2012
- 'EU Ministers Recognise Syrian National Council as Legitimate Representatives' (*The Journal.ie*, Dublin, 27 February 2012) <<http://www.thejournal.ie/eu-ministers-recognise-syrian-national-council-as-legitimate-representatives-367277-Feb2012/>> accessed 7 August 2012
- 'EU Steps up Syria Sanctions with Ban on Oil Imports' (*BBC News*, London, 2 September 2011) <<http://www.bbc.co.uk/news/world-middle-east-14759416>> accessed 5 January 2012
- 'EU Tightens Sanctions on Syria' (*Aljazeera*, 1 December 2011) <<http://www.aljazeera.com/news/middleeast/2011/12/2011121125337233662.html>> accessed 5 January 2012
- Evans G, 'Saving the Syrians' (*Project Syndicate*, 23 May 2012) <<http://www.project-syndicate.org/commentary/saving-the-syrians>> accessed 16 June 2012
- Falk R, 'Libya after Gaddafi: A Dangerous Precedent?' (*Al Jazeera*, 22 October 2011) <<http://www.aljazeera.com/indepth/opinion/2011/10/20111022132758300219.html>> accessed 6 May 2012
- 'Gaddafi's New Force of Child Soldiers Revealed' *The Scotsman* (Edinburgh, 17 April 2011) <<http://www.scotsman.com/news/gaddafi-s-new-force-of-child-soldiers-revealed-1-1588436>> accessed 14 May 2012
- Gerber R, 'Peacekeeping and the Responsibility to Protect' (*UN-USA, The Interdependent*, Washington D.C., 29 May 2012) <<http://theinterdependent.com/peacekeeping/article/peacekeeping-and-the-responsibility-to-protect>> accessed 7 July 2012
- Heintz J, 'Syria Crisis: Russia Accuses West of Blackmail on New Security Council Resolution' (*Huffington Post World*, 16 July 2012) <[http://www.huffingtonpost.com/2012/07/16/syria-crisis-russia-blackmail\\_n\\_1676235.html](http://www.huffingtonpost.com/2012/07/16/syria-crisis-russia-blackmail_n_1676235.html)> accessed 20 July 2012

- Hollenbach D, 'Humanitarian Intervention: Why, When and How?' *Commonweal Magazine* (New York, 3 November 2010) <<http://www.commonwealmagazine.org/humanitarian-intervention-0>> accessed: 6 November 2010
- 'Increasing Bloodshed Leads to Suspension of UN Observer Mission in Syria' (*Russia Today*, Moscow, 16 June 2012) <<http://www.rt.com/news/un-mission-escalating-violence-987/>> accessed 12 July 2012
- Labott E, 'Clinton to Syrian Opposition: Ousting al-Assad is Only First Step in Transition' (*CNN*, 6 December 2011) <[http://articles.cnn.com/2011-12-06/middleeast/world\\_meast\\_clinton-syrian-opposition\\_1\\_assad-syrian-opposition-syrian-national-council?\\_s=PM:MIDDLEEAST](http://articles.cnn.com/2011-12-06/middleeast/world_meast_clinton-syrian-opposition_1_assad-syrian-opposition-syrian-national-council?_s=PM:MIDDLEEAST)> accessed 12 May 2012.
- 'Libya: Russia Decries French Arms Drop to Libyan Rebels' (*BBC News*, London, 30 June 2011) <<http://www.bbc.co.uk/news/world-europe-13979632>> 5 August 2011
- McClean D and Varner B, 'Nations Press Myanmar for Entry as More Aid Arrives' (*Bloomberg*, Washington D.C., 13 May 2008) <<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aWBhdHdNOjfo&refer=home>> accessed 12 August 2012
- 'Medvedev Announces Independence for South Ossetia and Abkhazia' (*Russia Today*, Moscow, 27 August 2008) <<http://www.rt.com/news/medvedev-announces-independence-for-south-ossetia-and-abkhazia/>> accessed 11 May 2012
- Mouvement National de Liberation de l'Azawad, 'Des civils victimes des tirs de l'armée malienne' (*Mouvement National de Liberation de l'Azawad*, 23 February 2012) (*in French*) <<http://www.mnlamov.net/droits-de-lhomme.html>> accessed 6 July 2012
- Mouvement National de Liberation de l'Azawad, 'Déclaration d'Indépendance de l'Azawad' (*Mouvement National de Liberation de l'Azawad*, 6 April 2012) (*in French*) para 5 <<http://www.mnlamov.net/component/content/article/169-declaration-dindependance-de-lazawad.html>> accessed 6 July 2012
- 'No Let-Up in Gaddafi Offensive' (*Al Jazeera*, 17 March 2011) <<http://www.aljazeera.com/news/africa/2011/03/2011317645549498.html>> accessed 16 August 2012
- Oberti C, 'Burma's Rohingya Minority are the Roma of Asia' (*France 24*, 22 June 2012) <<http://www.france24.com/en/20120622-burma-rohingya-ethnic-violence-muslim-buddhist-rahkine-aung-san-suu-kyi>> accessed 2 August 2012
- Patrick SM, 'RIP for RtoP? Syria and the Dilemmas of Humanitarian Intervention' (*Council on Foreign Relations*, 12 June 2012) <<http://blogs.cfr.org/patrick/2012/06/12/rip-for-r2p-syria-and-the-dilemmas-of-humanitarian-intervention/>> accessed 10 July 2012
- Rafizadeh M, 'For Syria's Minorities, Assad is Security' (*Al Jazeera*, 16 September 2011) <<http://www.aljazeera.com/indepth/opinion/2011/09/2011912135213927196.html>> accessed 12 July 2012



- Rettman A, 'France Recognises Syrian Council, Proposes Military Intervention' (*EU Observer*, 24 November 2011) <<http://euobserver.com/defence/114380>> accessed 7 August 2012
- Saleh Y and Samir A, 'Arab League Suspends Syria as Global Pressure Rises' (*Reuters*, Cairo, 12 November 2011) <<http://www.reuters.com/article/2011/11/12/us-arabs-syria-idUSTRE7AB0CP20111112>> accessed 5 January 2012
- Schabas WA, 'Kampala Diary 9 June 2010' (*The ICC Review Conference: 2010*, 9 June 2010) <<http://iccreviewconference.blogspot.co.uk/>> accessed 28 October 2012
- 'Senegal Grants Diplomatic Recognition to Libyan Rebels' (*Star Africa*, 28 May 2011) <<http://www.starafrika.com/en/news/detail-news/view/senegal-grants-diplomatic-recognition-to-168769.html>> accessed 7 August 2012
- Slaughter AM, 'How to Halt the Butchery in Syria' *The New York Times* (New York, 23 February 2012) <[http://www.nytimes.com/2012/02/24/opinion/how-to-halt-the-butchery-in-syria.html?\\_r=1](http://www.nytimes.com/2012/02/24/opinion/how-to-halt-the-butchery-in-syria.html?_r=1)> Last accessed 12 July 2012
- -- 'Syrian Intervention is Justifiable, and Just' *The Washington Post* (Washington D.C., 8 June 2012) <[http://www.washingtonpost.com/opinions/syrian-intervention-is-justifiable-and-just/2012/06/08/gJQARHGjOV\\_story.html](http://www.washingtonpost.com/opinions/syrian-intervention-is-justifiable-and-just/2012/06/08/gJQARHGjOV_story.html)> accessed 6 July 2012
- Stahn C, 'RtoP, the ICC and the Libyan Arrests' (*The Hague Justice Portal*, 24 November 2011) <<http://www.haguejusticeportal.net/index.php?id=12998>> accessed 12 May 2012
- Starr S, 'Syria's Minorities are Afraid - After Assad, they shouldn't be' (*Huffington Post*, 9 July 2012) <[http://www.huffingtonpost.co.uk/stephen-starr/syrias-minorities-are-afraid\\_b\\_1652651.html](http://www.huffingtonpost.co.uk/stephen-starr/syrias-minorities-are-afraid_b_1652651.html)> accessed 12 July 2012
- 'Syrian Protest Derails US Mi-17 Deal with Russia' (*Flight Global*, 20 July 2012) <<http://www.flightglobal.com/news/articles/syrian-protest-derails-us-mi-17-deal-with-russia-374580/>> accessed 22 July 2012
- 'Syria UN Observer Mission Must Be 'Reconfigured' - Mood' (*BBC News*, London, 5 July 2012) <<http://www.bbc.co.uk/news/world-middle-east-18721577>> accessed 12 July 2012
- Tomuschat C, 'Uniting for Peace' (*UN Audiovisual Library of International Law*, 2008) <<http://untreaty.un.org/cod/avl/ha/ufp/ufp.html>> accessed 17 May 2011
- Traub J, 'Enough Talking Kofi' (*Foreign Policy*, 25 May 2012) <[http://www.foreignpolicy.com/articles/2012/05/25/enough\\_talking\\_kofi?page=0,0](http://www.foreignpolicy.com/articles/2012/05/25/enough_talking_kofi?page=0,0)> accessed 16 June 2012
- 'Turkey Imposes Economic Sanctions on Syria' (*BBC News*, London, 30 November 2011) <<http://www.bbc.co.uk/news/world-europe-15959770>> accessed 5 January 2012
- 'U.N. Approves Peacekeeping Force in Darfur, Despite Sudan Opposition' (*PBS News Hour*, 31 August 2006) <[http://www.pbs.org/newshour/updates/africa/july-dec06/darfur\\_08-31.html](http://www.pbs.org/newshour/updates/africa/july-dec06/darfur_08-31.html)> accessed 11 April 2012
- 'U.S. President Barack Obama Meets with Russian President Putin in Los Angeles' *Chicago Tribune* (Chicago, 19 June 2012) <<http://www.chicagotribune.com/news/columnists/ct-met-aj-kass-obama-putin.jpg-20120623,0,1874175.photo>> accessed 20 July 2012

- Vela J, 'Exclusive: Arab States Arm Rebels as UN Talks of Syrian Civil War' *The Independent* (London, 13 June 2012) <<http://www.independent.co.uk/news/world/middle-east/exclusive-arab-states-arm-rebels-as-un-talks-of-syrian-civil-war-7845026.html>> accessed 12 July 2012
- Watt N, 'Libya: Britain Backs Clinton View that UN has Sanctioned Arming Rebels' *The Guardian* (London, 30 March 2011) <<http://www.guardian.co.uk/world/2011/mar/30/libyan-britain-clinton-un-rebels>> accessed 16 June 2011

## REGIONAL ORGANISATIONS

- African Commission on Human and Peoples' Rights Res 'Strengthening the Responsibility to Protect in Africa' (28 November 2007) AU Doc. ACHPR/Res.117 (XXXXII) 07
- African Union Peace and Security Council, 'Communique' (14 March 2008) AU Doc PSC/PR/Comm(CXV)
  - 'Information Note on the Situation in Kenya and the Evolution of the Mediation Efforts' (14 March 2008) AU Doc PSC/PR/2(CXV)
- Commission on Security and Cooperation in Europe, 'Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE' (adopted 29 June 1990) <<http://www.osce.org/odihr/elections/14304>> accessed 12 November 2012
  - 'Report of the CSCE Meeting of Experts on National Minorities in Geneva' (1991) <[www.osce.org/hcnm/14588](http://www.osce.org/hcnm/14588)> accessed 12 October 2012
- Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3
- Council of Europe, Framework Convention for the Protection of National Minorities (1995) 34 ILM 351
  - 'Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: "The European Consensus"' (22 November 2005) COE Doc. 14820/05
  - Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria (9 May 2011) OJL 121 10 May 2011
  - Regulation (EU) No 504/2011 implementing Regulation (EU) 442/2011 concerning restrictive measures in view of the situation in Syria (23 May 2011) OJL 136 24 May 2011
- ECOWAS, 'Final Communiqué of the Extraordinary Session of the Authority of Heads of State and Government on the Côte d' Ivoire' (24 December 2010) No 192/2010
  - 'Resolution A/RES.1/03/11 of the Authority of the Heads of State and Government of ECOWAS on the Situation in the Côte d' Ivoire' (1 March 2011) No 043/2011
- European Commission, Commission Staff Working Document: Kosovo (under UNSC 1244/99) 2008 Progress Report' (5 November 2008) EU Doc SEC(2008)2697

- European Parliament Resolution, 'The Situation in Darfur' (28 September 2006) EP Doc P6\_TA(2006)0387
  - 'The Tragic Situation in Burma' (22 May 2008) EP Doc. P6\_TA(2008)0231
  - 'The Situation in Zimbabwe' (18 December 2008) EP Doc P6\_TA(2008)0640
  - 'Expulsion of NGO's from Darfur' (12 March 2009) EP Doc. P6\_TA(2009)0145
  - 'On the Southern Neighbourhood and Libya in particular' (10 March 2011) EP Doc P7\_TA(2011)0095
  - 'Situation in Syria, Bahrain and Yemen in the Context of the Situation in the Arab World and North Africa' (7 July 2011) EP Doc P7\_TA(2011)0333
- European Union, 'Statement of the High Representative on the extension of restrictive measures against Syrian individuals responsible for and associated with repression' (1 August 2011) EP Doc A/306/11 <[http://www.eu-un.europa.eu/articles/fr/article\\_11265\\_fr.htm](http://www.eu-un.europa.eu/articles/fr/article_11265_fr.htm)> accessed 5 January 2012
  - 'Summaries of Legislation: Accession Criteria (Copenhagen Criteria)' (*Europa*) <[http://europa.eu/legislation\\_summaries/glossary/accession\\_criteria\\_copenhagen\\_en.htm](http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhagen_en.htm)> accessed 14 August 2012
- OSCE, 'Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE' (1991) <<http://www.osce.org/odihr/elections/14310>> accessed 6 January 2012
  - High Commissioner on National Minorities, The Bolzano/Bozen Recommendations on National Minorities and Inter-State Relations and Explanatory Note (OSCE HCNM, The Hague 2008)
  - High Commissioner on National Minorities, 'The Rise of Populism and its Implications for National Minorities' (Keynote Speech by Knut Vollebaek OSCE HCNM at the 'European Year of Intercultural Dialogue: The Minority Agenda' seminar hosted by the Socialist Group in the European Parliament (PSE Group), Belgium, 11 December 2008) <<http://www.osce.org/hcnm/62452>> accessed 12 November 2012
- Report of the Independent International Fact-Finding Mission on the conflict in Georgia, 'Volume I' (September 2009) <<http://www.ceiig.ch/Report.html>> accessed 12 November 2012
- Venice Commission, 'Report of the Preferential Treatment of National Minorities by their Kin State' (2001) Doc. CDL/INF <[http://www.venice.coe.int/docs/2001/CDL-INF\(2011\)019-e.pdf](http://www.venice.coe.int/docs/2001/CDL-INF(2011)019-e.pdf)> accessed 18 June 2012

## RESEARCH/WORKING PAPERS

- Advisory Council on International Affairs, 'The Netherlands and the Responsibility to Protect: The Responsibility to Protect People from Mass Atrocities' (2010) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 10 October 2011
- Bellamy A, 'Mainstreaming the Responsibility to Protect in Peace Operations' (2010) Asia-

Pacific Centre for the Responsibility to Protect, Programme on the Protection of Civilians, Working Paper No. 3

- Claes J, 'Preventing Conflict in the "Stans"' (2010) United States Institute of Peace: Peace Brief No. 21, 3 <<http://www.usip.org/publications/preventing-conflict-in-the-stans>> accessed 17 June 2012
- Cooper R and Kohler J, 'The Responsibility to Protect: The New Global Moral Compact' (August 2006) 1, 5 <<http://r2pcoalition.org/content/view/21/45/>> accessed 12 May 2012
- Gal K, 'Bilateral Agreements in Central and Eastern Europe: A New Inter-State Framework for Minority Protection?' (1999) ECMI Working Paper No. 4. <<http://www.ecmi.de/publications/detail/04-bilateral-agreements-in-central-and-eastern-europe-a-new-inter-state-framework-for-minority-protection-191/>> accessed 14 October 2012
- Groves S, 'The US should Reject the U.N "Responsibility to Protect" Doctrine' (The Heritage Foundation Background Executive Summary No. 2130, 2008) <<http://www.heritage.org/research/reports/2008/05/the-us-should-reject-the-un-responsibility-to-protect-doctrine>> 17 June 2012
- Luck EC, 'The United Nations and the Responsibility to Protect' (August 2008) The Stanley Foundation Policy Analysis Brief <<http://www.stanleyfoundation.org/policyanalysis.cfm?id=345>> accessed 8 October 2012
- Nasic H, 'Minority Rights Instruments and Mechanisms: Minority Protection Along the Conflict Continuum' (2007) EURAC Research, European Academy
- Nollkaemper A and Jacobs D, 'Shared Responsibility in International Law: A Concept Paper' *ACIL Research Paper No 2011-07 SHARES Series* (finalised 2 August 2011)
- Rimmer S, 'Refugees, Internally Displaced Persons and the "Responsibility to Protect"' (March 2010) New Issues in Refugee Research, Research Paper No 185, UNHCR
- Woocher L, 'Developing a Strategy, Methods and Tools for Genocide Early Warning' (Report prepared for the Office of the Special Adviser to the UN Secretary-General on the Prevention of Genocide, September 2006) <[www.un.org/en/preventgenocide/adviser/pdf/Woocher%20Early%20warning%20report,%202006-11-10.pdf](http://www.un.org/en/preventgenocide/adviser/pdf/Woocher%20Early%20warning%20report,%202006-11-10.pdf)> accessed 10 August 2012

## TREATIES

- Montevideo Convention on the Rights and Duties of States (1933) (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19
- Convention on the Prevention and Punishment of the Crime of Genocide 1948 (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277
- UN Treaty Series, 'Status of the Convention on the Prevention and Punishment of the Crime of Genocide 1948' <[http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-1&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&lang=en)> accessed 16 June 2012

- Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.
- Convention Relating to the Status of Refugees (1951) (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150
- Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240
- Vienna Convention on the Law of Treaties 1969 (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331
- International Covenant on Civil and Political Rights 1966 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
- International Covenant on Economic, Social and Cultural Rights 1966 (adopted, entered into force) 993 UNTS 3
- Convention on the Elimination of All Forms of Discrimination against Women (1979) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85
- Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90

## UNITED NATIONS

- UNGA Res 217A (III), 'Universal Declaration of Human Rights' (1948) UN Doc A/810
- UNGA Res 377 (V), 'Uniting for Peace Resolution' (3 November 1950) UN Doc A/RES/377(V)
- UNGA Res 2106 (XX), 'International Convention on the Elimination of All Forms of Racial Discrimination' (21 December 1965) UN Doc A/RES/2106(XX)
- UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, F Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' (1979) UN Doc E/CN.4/Sub.2/384/Rev.1
- UN Human Rights Committee, 'General Comment No. 6: The Right to Life [Article 6]' (30 April 1982)
- UNGA Res 44/25, 'Convention on the Rights of the Child' (1989) UN Doc A/44/49
- UN Human Rights Committee, 'General Comment No. 18: Non-Discrimination' (10 November 1989)
- UN Committee on Economic, Social and Cultural Rights, 'The Nature of States Parties Obligations (Art. 2, par.1) CESCR General Comment No. 3' (14 December 1990)
- UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) UN Doc A/RES/47/135

- UN Human Rights Commission Resolution S-2/1, 'The Situation of Human Rights in the Territory of the Former Yugoslavia' (1992) UN Doc 1992/S-2/1
- UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 'Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities' (10 August 1993) UN Doc E/CN.4/Sub.2/1993/34
- UN Human Rights Committee, 'General Comment 23: Article 27- Rights of Minorities' (Fiftieth Session, 1994)
- UN ESCOR Human Rights Committee, 'Guiding Principles on Internal Displacement' (1998) UN Doc E/CN.4 /1998/53/Add.2
- UN ESCOR Human Rights Committee, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food' (12 May 1999) UN Doc E/C.12/1999/5
- UNSC Resolution 1296 (2000) UN Doc S/RES/1296
- Report of the UNSG, 'We the Peoples: The Role of the United Nations in the 21st Century' (2000) <<http://www.un.org/millennium/sg/report/full.htm>> accessed 12 August 2012
- UN Press Release, 'We the Peoples: The Role of the United Nations in the 21st Century' Presented to General Assembly by Secretary-General' (3 April 2000) UN Doc GA/9704 <<http://www.un.org/News/Press/docs/2000/20000403.ga9704.doc.html>> accessed 12 August 2012
- International Law Commission, 'Special Rapporteur on State Responsibility, James Crawford: Fourth Report on State Responsibility' (2001) UN Doc A/CN.4/517
- International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries' Yearbook of the International Law Commission Vol. 2, Part 2 (2001)
- International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (3 August 2001) UN Doc A/56/83
- Commission on Human Rights, 'Final text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities By Asbjørn Eide Chairperson of the Working Group on Minorities of the Sub-Commission on the Promotion and Protection of Human Rights' (2 April 2001) UN Doc E/CN.4/Sub.2/AC.5/2001/2
- Food and Agriculture Organisation of the United Nations, 'The Right to Adequate Food in Emergencies' (FAO Legislative Study No. 77, Rome 2002) <<http://www.fao.org/DOCREP/005/Y4430E/y4430e04.htm#TopOfPage>> accessed 13 June 2012
- Report of the High Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2004) UN Doc A/59/562
- UN Human Rights Committee, 'General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13

- UNSC Res 1556 (30 July 2004) UN Doc S/RES/1556(2004)
- UNSC Verbatim Record (30 July 2004) UN Doc S/PV.5015
- UNSC Verbatim Record (18 September 2004) UN Doc S/PV.5040
- UNSC Res 1584 (2005) UN Doc S/RES/1584
- UNSC Res 1591 (2005) UN Doc S/RES/1591
- Report of the UNSG, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (March 2005) UN Doc A/59/2005
- UNSC Verbatim Record (31 March 2005) UN Doc S/PV.5158
- UNGA, 'High-Level Meeting of the Plenary' (19 April 2005)  
<[http://old.reformtheun.org/index.php/government\\_statements/c304?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c304?theme=alt2)> accessed 7 August 2012
- UNGA, 'High-Level Meeting of the Plenary' (20 April 2005)  
<[http://old.reformtheun.org/index.php/government\\_statements/c304?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c304?theme=alt2)> accessed 7 August 2012
- UNGA President, 'Revised Draft Outcome Document of the High-Level Plenary Meeting of the UNGA of September 2005' (3 June 2005)
- UNGA, 'High-Level Meeting of the Plenary' (21 June 2005)  
<[http://old.reformtheun.org/index.php/government\\_statements/c427?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c427?theme=alt2)> accessed 7 August 2012
- UNSC Verbatim Record (21 June 2005) UN Doc S/PV.5209
- UNGA, 'High-Level Meeting of the Plenary' (21 June 2005)  
<[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 7 August 2012
- UNGA, 'High-Level Meeting of the Plenary' (22 June 2005)  
<[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 7 August 2012
- UNGA, 'High-Level Meeting of the Plenary' (30 June 2005)  
<[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 7 August 2012
- 'US Proposals for UN Reform' (22 June 2005)  
<[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 14 May 2012
- UNGA, 'High-Level Meeting of the Plenary' (1 July 2005)  
<[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 7 August 2012
- UNGA President, 'Draft Outcome Document' (22 July 2005) UN Doc A/59/HLPM/CRP.1/Rev.1
- UNGA, 'High-Level Meeting of the Plenary' (28 July 2005)  
<[http://old.reformtheun.org/index.php/government\\_statements/c427?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c427?theme=alt2)> accessed 7 August 2012

- UNGA, 'Amendments Proposed by the Cuban Delegation to the Second Revised Draft Outcome of the HLP of the General Assembly of September 2005 (A/59/HLP/CRP.1/Rev.2)' (August 2005)  
<[http://old.reformtheun.org/index.php/government\\_statements/c395?theme=alt2](http://old.reformtheun.org/index.php/government_statements/c395?theme=alt2)> accessed 12 September 2011
- UNGA President, 'Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005' (5 August 2005) UN Doc A/59/HLP/CRP.1/Rev.2
- Letter of the US Ambassador John Bolton to the UNGA President (30 August 2005)  
<[http://www.reformtheun.org/index.php?option=com\\_docman&task=cat\\_view&gid=15&limit=15&limitstart=0&order=date&dir=ASC&category=9&Itemid=240](http://www.reformtheun.org/index.php?option=com_docman&task=cat_view&gid=15&limit=15&limitstart=0&order=date&dir=ASC&category=9&Itemid=240)> accessed 14 May 2012
- UNGA President's Draft Negotiating Document for the High-Level Plenary Meeting of the General Assembly of September 2005, submitted by the President of the General Assembly' (6 September 2005) <<http://www.responsibilitytoprotect.org/index.php/document-archive/united-nations?view=fjrelated&id=2410>> accessed 11 August 2012
- 'Draft Negotiated Outcome Document' (12 September 2005, 8 am)  
<<http://www.responsibilitytoprotect.org/index.php/document-archive/united-nations?view=fjrelated&id=2410>> accessed 11 August 2012
- 'Draft Negotiated Outcome Document' (12 September 2005, 12:30 pm)  
<<http://www.responsibilitytoprotect.org/index.php/document-archive/united-nations?view=fjrelated&id=2410>> accessed 11 August 2012
- UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.2
- UNGA Meeting Record (14 September 2005) UN Doc A/60/PV.4
- UNGA Meeting Record (15 September 2005) UN Doc A/60/PV.5
- UNGA Meeting Record (15 September 2005) UN Doc A/60/PV.6
- UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.7
- UNGA Meeting Record (16 September 2005) UN Doc A/60/PV.8
- UNGA Meeting Record (17 September 2005) UN Doc A/60/PV.9
- UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1
- Draft UNSC Res (21 November 2005)  
<<http://www.responsibilitytoprotect.org/index.php/document-archive/united-nations?view=fjrelated&id=2410>> accessed 10 January 2012
- UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319
- UNSC Verbatim Record (9 December 2005) UN Doc S/PV.5319(Res. 1)
- UNGA, 'Report of the International Law Commission, Fifty-Eighth Session' (2006) UN Doc A/61/10, 468
- UN Human Rights Commission, 'Specific Groups and Individuals: Minorities, Report of the Independent Expert on Minority Issues' (6 January 2006) UN Doc E/CN.4/2006/74



- UNGA Resolution 60/251 (3 April 2006) UN Doc A/RES/60/251
- Draft UNSC Res (27 April 2006) UN Doc S/2006/267
- UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674
- UNSC Verbatim Record (28 June 2006) UN Doc S/PV/5476
- UNSC Res 1706 (31 August 2006) S/RES/1706 (2006)
- UNSC Verbatim Record (31 August 2006) UN Doc S/PV.5519
- UNSC Verbatim Record (15 September 2006) UN Doc S/PV.5526
- UNGA 'Opening of the Sixty First Session of the UN General Assembly' (September 2006) <<http://www.un.org/webcast/ga/61/index.shtml>> accessed 14 October 2011
- Letter of the Representative of the United States to the UNSC President, 'The Situation in Myanmar' (1 September 2006) UN Doc S/2006/742
- UNSC Verbatim Record (4 December 2006) UN Doc S/PV.5577
- UNHRC, 'Report of the Independent Expert on Minority Issues' (2 February 2007) UN Doc A/HRC/4/9
- UNHRC, 'Report of the High-Level Mission on the Situation of Human Rights in Darfur' (9 March 2007) UN Doc A/HRC/4/80
- UN Press Release, 'Human Rights Council Discusses Report of High-Level Mission on Situation of Human Rights in Darfur' (16 March 2007) UN Doc HRC/07/12 <<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/E6DF2E2811EABFA3C12572A000717B7E?opendocument>> accessed 11 May 2011
- UNSC Res 1755 (20 April 2007) UN Doc S/RES/1755
- UNSC Verbatim Record (22 June 2007) UN Doc S/PV.5703
- UNSC Res 1769 (31 July 2007) UN Doc S/RES/1769
- Letter of the UNSG to the President of the Security Council (31 August 2007) UN Doc S/2007/271
- UNGA, 'Opening of the Sixty Second Session of the UNGA' (September 2007) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 6 January 2012
- Report of the UNSG, 'Proposed Programme Budget for the Biennium 2008-2009: Estimates in Respect of Special Political Missions, Good Offices and Other Political Initiatives Authorised by the General Assembly and/or the UNSC' (30 October 2007) UN Doc A/62/512/Add.1
- UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781
- UNSC Verbatim Record (20 November 2007) UN Doc S/PV.5781(Res. 1)
- Letter from the UNSG to the President of the UNSC (7 December 2007) UN Doc S/2007/721
- UNSC Verbatim Record (17 December 2007) UN Doc S/PV.5805
- UNGA, 'Report of the International Law Commission: Sixtieth Session' (2008) UN Doc A/63/10

- UNHRC, 'Report of the Secretary-General on the implementation of the Five Point Action Plan and the activities of the Special Adviser on the Prevention of Genocide' (2008) UN Doc A/HRC/7/37
- UNSC Res 1795 (2008) UN Doc S/RES/1795
- Statement of the UNSC President, 'Situation in Kenya' (6 February 2008) UN Doc S/PRST/2008/4
- UNHCHR, 'Report from the OCHR Fact-Finding Mission to Kenya (6-28 February 2008)' (2008)
- UN Department of Public Information, 'The United Nations and Kenya: Briefing Note' (7 February 2008)  
<<http://www.responsibilitytoprotect.org/files/Feb%202008%20Kenya%20UN%20briefing%20note.pdf>> accessed 17 June 2012
- UN Press Release, 'Secretary-General Appoints Edward C. Luck of United States as Special Advisor' (21 February 2008) UN Doc SG/A/1120
- UNGA Fifth Committee (3 March 2008) in UN Press Release, 'United Nations Human Resources Structures must be adapted to meet Growing Demands of Peacekeeping, Other Field Operations, Budget Committee Told' (4 March 2008) UN Doc GA/AB/3837  
<<http://www.un.org/News/Press/docs/2008/gaab3837.doc.htm>> accessed 2 November 2011
- UNSC Verbatim Record (20 March 2008) UN Doc S/PV.5858
- UNHRC, 'Prevention of Genocide' (25 March 2008) UN Doc A/HRC/7/L.26
- UNHRC, 'Protect, Respect, Remedy: A Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5
- United Nations Press Release, 'Alarmed by Violence in Zimbabwe Arbour Urges Restraint' (27 April 2008)  
<<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/BB073B7B294BC46FC1257438003A0672?opendocument>> accessed 12 May 2012
- UNSC Verbatim Record (27 May 2008) UN Doc S/PV.5898(Res. 1)
- UNSC Verbatim Record (8 July 2008) UN Doc S/PV.5929
- Address of the UNSG, 'Responsible Sovereignty: International Co-operation for a Changed World' (15 July 2008, Berlin) UN Doc SG/SM/11701
- UNSC Verbatim Record (8 August 2008) UN Doc S/PV.5951
- UNSC Verbatim Record (8 August 2008) UN Doc. S/PV.5952
- UNSC Verbatim Record (10 August 2008) UN Doc S/PV.5953
- UNSC Verbatim Record (19 August 2008) UN Doc S/PV.5961
- UNSC Verbatim Record (28 August 2008) UN Doc S/PV.5969
- UNGA, 'Opening of the Sixty Third Session of the UNGA' (September 2008)  
<<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 6 January 2012

- UN Press Release, 'Human Rights Council Calls for the Immediate End to all Human Rights Violations in the Democratic Republic of Congo' (1 December 2008) <<http://www.unhchr.ch/huricane/hurricane.nsf/view01/E8CCAFBBA4481A51C12575120056D55E?opendocument>> accessed 6 July 2012
- Office of the President of the UNGA, 'Concept Note on Responsibility to Protect Populations from Genocide, War Crimes, Crimes Against Humanity and Ethnic Cleansing' (2009), 2 <<http://www.un.org/ga/president/63/interactive/protect/conceptnote.pdf>> accessed 12 November 2012
- UNHRC Res S-11 (2009) UN Doc A/HRC/S-11/2
- UNSG Report, 'Implementing the Responsibility to Protect' (12 January 2009) UN Doc A/63/677
- UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066
- UNSC Verbatim Record (14 January 2009) UN Doc S/PV.6066 (Res.1)
- UNHRC, 'Outcome Document of the Durban Review Conference' (24 April 2009) <<http://www.un.org/durbanreview2009/>> accessed 24 November 2011
- International Law Commission, 'Second Report on the Protection of Persons in the Event of Disasters' (7 May 2009) UN Doc A/CN.4/615
- UNSC Verbatim Record (26 June 2009) UN Doc S/PV.6151
- UNSC Verbatim Record (26 June 2009) UN Doc S/PV.6151 (Res.1)
- International Law Commission, 'Provisional Summary Record of the 3015<sup>th</sup> Meeting of the 6th July 2009' (15 July 2009) UN Doc A/CN.4/SR.3015
- International Law Commission, Provisional Summary Record of the 3019<sup>th</sup> Meeting of the 10 July 2009' (22 July 2009) UN Doc A/CN.4/SR.3019
- UNGA Meeting Record (23 July 2009) UN Doc A/63/PV.97
- UN Press Release, 'Delegates Seek to End Global Paralysis in Face of Atrocities as General Assembly holds Interactive Dialogue on Responsibility to Protect' (23 July 2009) UN Doc GA/10847 <<http://www.un.org/News/Press/docs/2009/ga10847.doc.htm>> accessed 2 January 2012
- UNGA Meeting Record (24 July 2009) UN Doc A/63/PV.98
- UN Press Release, 'More than Forty Delegates Expressed Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect' (24 July 2009) UN Doc GA/10849 <<http://www.un.org/News/Press/docs/2009/ga10849.doc.htm>> accessed 2 January 2012
- UN Press Release, 'Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate' (28 July 2009) UN Doc GA/10850 <<http://www.un.org/News/Press/docs/2009/ga10850.doc.htm>> accessed 2 January 2012
- UNGA Meeting Record (28 July 2009) UN Doc A/63/PV.100
- UNGA Draft Res (1 September 2009) UN Doc A/63/L.80
- UNGA Draft Res (10 September 2009) UN Doc A/63/L.80/Rev.1

- UNGA Meeting Record (14 September 2009) UN Doc A/63/PV.105
- UNGA Res 63/308 (14 September 2009) UN Doc A/RES/63/308
- UNHRC, 'Report of the UN Fact-Finding Mission on the Gaza Conflict' (15 September 2009) UN Doc A/HRC/12/48
- UNGA, 'Opening of the Sixty Fourth Session of the UNGA' (September 2009)  
<<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 6 January 2012
- UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894
- UNSC Verbatim Record (11 November 2009) UN Doc S/PV.6216 (Res.1)
- UNSC Res 1942 (2010) UN Doc S/RES/1942
- UNHRC, 'Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance' (30 March 2010) UN Doc A/HRC/14/43
- UN Press Release, 'UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Kyrgyzstan' (15 June 2010)  
<<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 27 July 2012
- 'UNGA Thematic Debate on Early Warning, Assessment and the Responsibility to Protect' (July 2010) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 6 January 2012
- UNSC Verbatim Record (7 July 2010) UN Doc S/PV.6354
- UNSC Verbatim Record (7 July 2010) UN Doc S/PV.6354(Res. 1)
- Report of the UNSG, 'Early Warning, Assessment and the Responsibility to Protect' (14 July 2010) UN Doc A/64/864
- UNSG's Special Representative on Business and Human Rights, 'The UN "Protect, Respect and Remedy" Framework for Business and Human Rights' (September 2010), 2  
<<http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf>> accessed 11 February 2012
- UNGA, 'Opening of the Sixty Fifth Session of the UNGA' (September 2010)  
<<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 6 January 2012
- UN Press Release, 'Statement attributable to the Spokesperson for Secretary-General on Guinea' (3 November 2010) <<http://www.responsibilitytoprotect.org/index.php/crises/185-crisis-in-guinea/3046-secretary-general-ban-ki-moon-statement-attributable-to-the-spokesperson-for-secretary-general-on-guinea->>> accessed 10 August 2011
- UNSC Verbatim Record (22 November 2010) UN Doc S/PV.6427
- UNSC Verbatim Record (22 November 2010) UN Doc S/PV.6427 (Res.1)
- UNSC Verbatim Record (7 December 2010) UN Doc S/PV.6437
- UNSC Res 1962 (20 December 2010) UN Doc S/RES/1962
- UN Press Release, 'Harmonising Staff Working Conditions, Strengthening UN Information Technology Among Issues, As Budget Committee Approves 18 Texts, Concludes Session'

(23 December 2010) UN Doc GA/AB/3980

<<http://www.un.org/News/Press/docs/2010/gaab3980.doc.htm>> accessed 24 October 2011

- UN Press Release, 'UN Secretary-General's Special Advisors on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire' (29 December 2010)
- Report of the UNSG, 'The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect' (2011) UN Doc A/59/744
- UNSC Res 1973 (2011) UN Doc S/RES/1973
- UNSC Res 1975 (2011) UN Doc S/RES/1975
- UNSC Res 1996 (2011) UN Doc S/RES/1996
- UNSC Res 2003 (2011) UN Doc S/RES/2003
- UN Press Release, 'Statement attributed to the UN Secretary-General's Special Advisors on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire' (19 January 2011)  
<<http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG,%20Special%20Advisers%20Statement%20on%20Cote%20d'Ivoire,%2019%20Jan%202011.pdf>> accessed 12 May 2012
- UN Press Release, 'UN Secretary-General's Special Advisors on the Prevention of Genocide and the Responsibility to Protect on the Situation in Libya' (22 February 2011)  
<<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 17 June 2012
- UNHRC Res S-15/1 (25 February 2011) UN Doc A/HRC/S-15/1
- UNHRC, 'Situation of Human Rights in the Libyan Arab Jamahiriya: Statement of Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights' (25 February 2011) <[http://www2.ohchr.org/english/bodies/hrcouncil/.../A.HRC.17.44\\_AUV.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/.../A.HRC.17.44_AUV.pdf)> accessed 14 November 2011
- UN Press Release, 'Human Rights Council Debates Situation of Human Rights in Libya' (25 February 2011)  
<<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10766&LangID=E>> accessed 14 November 2011
- UN Press Release, 'Human Rights Council Passes Resolution on Syria in Special Session' (25 February 2011)  
<<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10768&LangID=E>> accessed 3 August 2012
- UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970
- UNSC Verbatim Record (26 February 2011) UN Doc S/PV.6491
- UN Press Release, 'General Assembly Suspends Libya from Human Rights Council' (1 March 2011) UN Doc GA/11050  
<<http://www.un.org/News/Press/docs/2011/ga11050.doc.htm>> accessed 14 November 2011
- UN Press Release, 'UN Secretary-General's Special Advisors on the Prevention of Genocide and the Responsibility to Protect on the Situation in the Abyei Region of Sudan' (16 March 2011) <<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 27 July 2012

- UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973
- UNSC Verbatim Record (17 March 2011) UN Doc S/PV.6498
- UNSC Verbatim Record (30 March 2011) UN Doc S/PV.6508
- UN High Commissioner for Human Rights, 'Pillay Denounces Escalation of Government Crackdown in Syria, Calls for Immediate End to Killings' (25 April 2011) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10958&LangID=E>> accessed 14 November 2011
- UNSG, 'Secretary-General Condemns Syria Killings, Calls for an End to Violence' (25 April 2011) UN Doc SG/SM/13521
- UNSC Verbatim Record (27 April 2011) UN Doc S/PV.6524
- UNHRC S-16/1, 'The Current Human Rights Situation in the Syrian Arab Republic in the Context of Recent Events' (29 April 2011) UN Doc A/HRC/RES/S-16/1
- UNSC Verbatim Record (4 May 2011) UN Doc S/PV.6528
- UNSC Verbatim Record (10 May 2011) UN Doc S/PV.6531 (Res.1)
- UNHRC, 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya' (1 June 2011) UN Doc A/HRC/17/44
- UN Press Release, 'Statement by the Special Advisers of the United Nations Secretary-General, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria' (2 June 2011) <<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 27 July 2012
- UN Press Release, 'Under-Secretary-General for Political Affairs, Briefing Security Council on Libya Situation, Says Negotiation Process must have Time to 'Grow and Bear Fruit'' (27 June 2011) UN Doc SC/10297
- UNGA, 'Thematic Debate on the Role of Regional Organisations in the Implementation of the Responsibility to Protect' (12 July 2011) <<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 16 June 2012
- UN Press Release, 'Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria' (21 July 2011) <<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 14 November 2011
- UNSC Verbatim Record (28 July 2011) UN Doc S/PV.6595
- UNSC Presidential Statement, 'The Situation in the Middle East' (3 August 2011) UN Doc S/PRST/2011/16
- UN Press Release, 'Human Rights Council Debates Situation of Human Rights in Syrian Arab Republic' (22 August 2011) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11324&LangID=E>> accessed 14 November 2011

- Committee on Civil and Political Rights, 'Article 19: Freedoms of Opinion and Expression, General Comment No.34' (12 September 2011)
- UNHRC, 'Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic' (15 September 2011) UN Doc A/HRC/18/53
- UNSC Res 2009 (16 September 2011) UN Doc S/RES/2009
- 'Opening of the Sixty Sixth Session of the UNGA' (September 2011)  
<<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 6 January 2012
- Draft UNSC Res (4 October 2011) UN Doc S/2011/612
- UNSC Verbatim Record (4 October 2011) UN Doc. S/PV.6627
- UNSC Res 2014 (21 October 2011) UN Doc S/RES/2014(2011)
- UNSC Verbatim Record (21 October 2011) UN Doc S/PV.6634
- UNGA/UNSC, 'Annex to the Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General: Responsibility while Protecting: Elements for the Development and Promotion of a Concept' (11 November 2011) UN Doc A/66/551-S/2011/701
- UN Press Release, 'Third Committee Approves Resolution Condemning Human Rights Violations in Syria' (22 November 2011) UN Doc GA/SHC/4033  
<<http://www.un.org/News/Press/docs/2011/gashc4033.doc.htm>> accessed 5 January 2012
- UNGA Third Committee Voting Record, 'Situation of Human Rights in the Syrian Arab Republic' (22 November 2011) UN Doc A/C.3/66/L.57/Rev.1
- UN Press Release, 'General Assembly Adopts more than Sixty Resolutions Recommended by Third Committee Including Text Condemning Grave, Systematic Human Rights Violations in Syria' (19 December 2011) UN Doc GA/11198  
<<http://www.un.org/News/Press/docs/2011/ga11198.doc.htm>> accessed 5 January 2012
- UNSC Res 2043 (2012) UN Doc S/RES/2043
- Draft UNSC Res (4 February 2012) UN Doc S/2012/77
- UNSC Verbatim Record (4 February 2012) UN Doc S/PV.6711
- UN Press Release, 'Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, Urge Immediate Action to End Violence in Syria' (10 February 2012)  
<<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 27 July 2012
- UNSG, 'Readout of the Secretary-General's Meeting with H.E. Mr. Sergey Lavrov, Minister of Foreign Affairs of the Russian Federation' (16 February 2012)  
<<http://www.un.org/sg/offthecuff/index.asp?nid=2229>> accessed 20 July 2012
- UNGA, 'Informal Discussion on Responsibility While Protecting' (21 February 2012)  
<<http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/4002-informal-discussion-on-brazils-concept-of-responsibility-while-protecting>> accessed 30 May 2012
- UNGA Res 66/253 (21 February 2012) UN Doc A/RES/66/253

- UNGA Res 66/176 (23 February 2012) UN Doc A/RES/66/176
- UN Press Release, 'Marking a Full Year of Violent Suppression of Anti-Government Protests in Syria, the United Nations Secretary-General's Special Advisers on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, Release the Following Statement' (15 March 2012)  
<<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 27 July 2012
- UNGA Draft Res, 'Improving the Working Methods of the Security Council' (28 March 2012) UN Doc A/66/L.42
- UNSC Res 2042 (14 April 2012) UN Doc S/RES/2042
- UN Press Release, 'Switzerland Withdraws Draft Resolution in General Assembly Aimed at Improving Security Council's Working Methods to Avoid 'Politically Complex' Wrangling' (16 May 2012) UN Doc GA/11234  
<<http://www.un.org/News/Press/docs/2012/ga11234.doc.htm>> accessed 7 August 2012
- UN OHCHR, 'Human Rights Council Opens Fourth Special Session on Syria' (1 June 2012)  
<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12212&LangID=E>> accessed 7 July 2012
- UN OHCHR, 'Human Rights Council Requests Commission of Inquiry to Conduct a Special Inquiry in the Events in El Houleh' (1 June 2012)  
<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12215&LangID=E>> accessed 7 July 2012
- UNHRC Res S-19/1, 'The Deteriorating Situation of Human Rights in the Syrian Arab Republic, and the Recent Killings in El-Houleh' (4 June 2012) UN Doc A/HRC/RES/S-19/1
- UN Press Release, 'Statement of the Special Advisers of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect on the Situation in Syria' (14 June 2012) <<http://www.un.org/en/preventgenocide/adviser/statements.shtml>> accessed 27 July 2012
- UN Press Release, 'Security Council Examining Request for UN Mandate for African Troops in Mali' (18 June 2012)  
<<http://www.un.org/apps/news/story.asp?NewsID=42266&Cr=+mali+&Cr1=>>> accessed 6 July 2012
- UNSC Verbatim Record (25 June 2012) UN Doc S/PV.6790
- UN News, 'Syria: After Moscow Meeting, Joint Special Envoy Voices Hope for Council Agreement' (New York, 17 July 2012)  
<<http://www.un.org/apps/news/story.asp?NewsID=42491&Cr=Syria&Cr1=>>> accessed 20 July 2012
- Draft UNSC Res (19 July 2012) UN Doc S/2012/538
- UNSC Verbatim Record (19 July 2012) UN Doc S/PV.6810
- Report of the UNSG, 'Responsibility to Protect: Timely and Decisive Response' (25 July 2012) UN Doc A/66/874-S/2012/578
- Draft UNGA Res, 'The Situation in the Syrian Arab Republic' (31 July 2012) UN Doc



A/66/L.57 (adopted on the 3 August 2012)

- UN Press Release, 'General Assembly, in Resolution, Demands All in Syria 'Immediately and Visibly' Commit to Ending Violence that Secretary-General says is Ripping Country Apart' (3 August 2012) UN Doc GA/11266  
<<http://www.un.org/News/Press/docs/2012/ga11266.doc.htm>> accessed 8 August 2012
- UN News Centre, 'Interview with UN Deputy Secretary-General Jan Eliasson' (27 August 2012) <<http://www.un.org/apps/news/newsmakers.asp?NewsID=68>> accessed 11 October 2012
- UN Press Release, 'Responsibility to Protect Faces Urgent Test 'Here and Now', Secretary-General Tells General Assembly, Stressing Immense Human Cost of Failure in Syria' (5 September 2012) UN Doc GA/11271
- UNGA, 'Interactive Dialogue on Timely and Decisive Response'  
<<http://www.responsibilitytoprotect.org/index.php/document-archive/government?view=fjrelated&id=2409>> accessed 17 October 2012.
- UNHRC, 'The Human Rights Based Approach to Development Cooperation Towards a Common Understanding among the UN Agencies'  
<[http://www.undg.org/archive\\_docs/6959The\\_Human\\_Rights\\_Based\\_Approach\\_to\\_Development\\_Cooperation\\_Towards\\_a\\_Common\\_Understanding\\_among\\_UN.pdf](http://www.undg.org/archive_docs/6959The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf)> accessed 12 May 2012 [undated]
- Office of the Special Adviser of the Secretary-General on the Prevention of Genocide, 'Office of the UN Special Adviser on the Prevention of Genocide: Analysis Framework'  
<[http://www.un.org/en/preventgenocide/adviser/engagement\\_partners.shtml](http://www.un.org/en/preventgenocide/adviser/engagement_partners.shtml)> accessed 10 October 2012 [undated]